DOCUMENT RESUME

ED 181 531 EA 012 005

AUTHOR Peeley, Malcolm M.; And Others
TITLE Schools & the Courts. Volume II: Methodology, Student Rights, and Fiscal Equality.
INSTITUTION Oregon Univ., Eugene. ERIC Clearinghouse on Educational Management.
SPONS AGENCY National Inst. of Education (DHEW), Washington, D.C.
PUB DATE 79
CONTRACT 400-78-0007
NOTE 128p.; For individual chapters of this document, see EA 012 006-009; For related documents, see EA 012 000-009
AVAILABLE FROM ERIC Clearinghouse on Educational Management, University of Oregon, Eugene, OR 97403 ($5.95; $10.95 for both Volume I and Volume II)

EDRS PRICE MF01/PC06 Plus Postage.
DESCRIPTORS Court Cases; *Court Role; Discipline; Elementary Secondary Education; *Finance Reform; Models; School Districts; Social Science Research; *Student Rights; *Supreme Court Litigation; *Theories; *Values
IDENTIFIERS *Ingraham v Wright; Robinson v Cahill; Serrano v Priest

ABSTRACT

Eight papers examining different aspects of the effects of court decisions on education are contained in this book, the second of two volumes. The papers were solicited from scholars in the fields of law, political science, sociology, and education in conjunction with a 1979 conference held in Madison, Wisconsin. The conference was called to analyze the impact of desegregation, finance, and student rights and discipline. Chapter 1 examines ways in which sociological scholars have conceived of legal impact. Chapter 2 explores the application of cultural jurisprudence as a mode of inquiry into high court decisions and includes a discussion of how to do a values study. In Chapter 3, Supreme Court cases dealing with student rights and discipline in the schools are examined in detail. The final chapter presents a model of implementation for educational reform litigation. (Author/LD)

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ED181531

SCHOOLS & THE COURTS

Volume II

METHODOLOGY, STUDENT RIGHTS, AND FISCAL EQUITY

Malcolm M. Feeley, Philip K. Piele,
Ellen Jane Hollingsworth,
William H. Clune III

U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
NATIONAL INSTITUTE OF EDUCATION

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ERIC® Clearinghouse on Educational Management
University of Oregon, Eugene, Oregon
1979

EA 012 005

Library of Congress Catalog Number: 79-55031
ERIC/CEM Accession Number: EA 012 005 (Volume 2)

Printed in the United States of America, 1979
ERIC Clearinghouse on Educational Management
University of Oregon
Eugene, Oregon 97403

Additional copies are available from the Clearinghouse for $5.95; both volumes, $10.95.

The material in this publication was prepared pursuant to a contract with the National Institute of Education, U.S. Department of Health, Education, and Welfare. Contractors undertaking such projects under government sponsorship are encouraged to express freely their judgment in professional and technical matters. Prior to publication, the manuscript was submitted to the National Organization on Legal Problems of Education for critical review and determination of professional competence. This publication has met such standards. Points of view or opinions, however, do not necessarily represent the official view or opinions of either the National Organization on Legal Problems of Education or the National Institute of Education.

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Preface

The courts' impact on schools was the theme of a conference held in Madison, Wisconsin, on April 26-27, 1979, cosponsored by the ERIC Clearinghouse on Educational Management at the University of Oregon and the School of Education of the University of Wisconsin—Madison.

The conference was called to analyze the impact of judges' decisions on school policy, particularly in the areas of desegregation, finance, and student rights and discipline. Because of the breadth of that impact, analysis of which requires the research skills and perspectives of several disciplines, the conference was intentionally eclectic in both subject matter and attendance. Eight papers examining different aspects of the effects of court decisions on education were solicited from scholars from the fields of law, political science, sociology, and education, as well as a school practitioner and an attorney.

These papers, revised and edited since their presentation, are contained in this two-volume monograph, of which the ERIC Clearinghouse on Educational Management is pleased to serve as publisher. Volume one combines four papers on desegregation; volume two includes two papers on the methodology of assessing the impact of court decisions, a third paper on the impact of student rights and discipline cases, and a fourth on school finance decisions.

I wish to acknowledge the careful editing performed on the manuscripts by two members of the Clearinghouse's staff —Stuart Smith and Ellen Rice. Shonna Husbands deserves credit for the attractive design.

Philip K. Piele
Professor and Director
ERIC Clearinghouse on Educational Management

Foreword

It is my pleasure to write this foreword inasmuch as I chaired the Phi Delta Kappan Commission where the idea for an impact symposium germinated and also participated as a discussant at the symposium, where these papers were presented.

The four papers that constitute the contents of this second volume of *Schools and the Courts* appear at first blush to be separate, albeit significant, works. Writing a foreword for them as a collection is much like the process described in the Piele paper—moving from information in isolation to the insight of interrelationships.

As isolated works, each of the four papers has indisputable import. Clune's paper presents a paradigm of implementation for educational reform litigation. He views the implementation process as a series of dilemmas, or tradeoffs, which cluster together across a matrix of continua. The levels of these continua concern the goal, standards, typical majoritarian response, enforceability problem, and political arena of the implementation. Tracing the stories of the school finance cases in California and New Jersey—*Serrano* and *Robinson*—Clune demonstrates his paradigm as a predictive model for social change and a normative model for judicial involvement.

Feeley uses other writers rather than case studies as his source material. Starting with Shapiro, he classifies the recent social science approach to impact research by means of a continuum and criticizes it as being too narrow and trivial. Feeley then sketches the outlines of an emergent, philosophical-historical approach to impact research, based on Horowitz's and Scheingold's opposing views of the capacity of courts and Selznick's and Fuller's counterposed works concerning the nature and consequences of legality.

Hollingsworth's paper reviews Supreme Court and related lower court decisions concerning student rights and discipline, discusses the informational channels by which teachers and administrators gain acquaintance with the issues and rulings in such decisions, and reports the results of an empirical survey of teachers' knowledge level regarding such

decisions. She concludes that the Supreme Court's impact, the informational channels' effectiveness, and the teachers' knowledge level, in this area at least, are all at most modest.

Piele's paper describes his personal process of arriving at a cultural jurisprudential analysis of the *Ingraham v. Wright* decision. Using the opinions, briefs, and transcripts of the case and the multiple sources of history books, anthropological studies, popular periodicals and films, literary references, and philosophical works, he moved from anxiety to synergy, discovering interrelationships among pieces of material that previously seemed to be in isolation from one another.

It is in this kind of synergic combination that these four papers provide added energy and excitement. Upon closer examination, interrelationships emerge among and between the papers. One finds a common goal among the four papers, to move beyond a narrow conception of impact to obtain a broader and fresher perspective on the role of courts in school affairs. In Clune's conception of "implementation," Feeley's call for a new research agenda, Hollingsworth's study of the discipline decisions, and Piele's analysis of *Ingraham*, there is a common conclusion that the impact of court decisions on school operations is too complex and contextual for traditional theory and methodology. One finds a search for a solution in the multiple methods and sources of an eclectic, cross-disciplinary view.

Interrelationships also emerge between the papers. The commonalities and corollary contrasts follow an orderly pairing of the papers. Clune and Feeley both use multi-leveled continua as a framework for their analyses. They similarly stand together in their criticism of Campbell and Stanley's empirical methodology for impact research and in their reference to Horowitz's one-sided view of judicial activism. In the search for a broader view, Clune brings the theoretical-empirical perspective of political science into the law school, while conversely Feeley metamorphoses out of the confines of the political scientist into the flowing robes of the legal philosopher.

Feeley and Hollingsworth both point out that a single Supreme Court decision's importance may be more symbolic than formal, more reflective than directive. In Feeley's words, "even the most important Court decisions often

express or cap a policy or trend set in motion by other prior events." In Hollingsworth's words, such "decisions might be more usefully seen as part of a stream of events, not the source." Feeley and Hollingsworth also agree that recent Supreme Court decisions have had only modest impact on school affairs, given the big-bang effect of earlier Court decisions in this area. Feeley, however, eschews empirical inquiry, while Hollingsworth embraces it in her true-false questionnaire survey of teachers.

Both Hollingsworth and Piele use as a focal point the *Ingraham* decision. They also concur that the perception of a decision in broad brush strokes may be different from and more important than the intention behind the decision in terms of its detailed rulings. Hollingsworth found in her survey that teachers' dominant reaction to decisions like *Ingraham* was apprehension, quite unrelated to their knowledge about the decision. Citing political cartoons in newspapers reporting the decision, Piele similarly demonstrated the discrepancy between what the Court pronounced and the consumers perceived. However, from a common beginning in straightforward legal analysis, Hollingsworth's paper ends in empirical pessimism, whereas Piele's paper culminates in cross-disciplinary delight.

Paraphrasing Piele, within and among these four papers, the reader comes to understand and appreciate the difficulty of achieving purely judicial solutions to educational problems. Through the empirical data of Clune and Hollingsworth and the philosophical forays of Feeley and Piele, one is left with not only a feeling for the problem, but also a sense of progress toward its resolution.

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Approaches to the Study of Court Impact

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Introduction

A decade ago at a conference whose topic was similar to the one today, a political scientist—Martin Shapiro—introduced the sessions with an assessment of the social science literature on the impact of courts, a task akin to mine. There have been important changes in the intervening years, and I must go beyond Shapiro's analysis. Indeed, his criticism was that the perspective of most impact studies is too narrow, and today I must make the same criticism of his analysis. Still a review of his discussion is worthwhile, for it laid out many of the central problems in the literature on impact.

Let me summarize his simple but helpful classification. He developed a continuum of generality and scope along which he placed United States Supreme Court impact studies. At one end he placed the study of a particular decision. Here the Supreme Court's decision is viewed as a clear command, and the task of impact analysis is to determine the extent to which this order is followed. Next is the concern with a group of court decisions, an evolving legal or constitutional doctrine. This concern is distinguished from the single decision, either because there is no single "big" decision or because the researcher's concern covers several distinct areas of the law (for example, an interest in the impact of cases ordering the integration of public facilities). Finally, he argued, there is the task of charting the impact of the Supreme Court as an institution on the political culture and history of this country.

Each of these foci of inquiry suggests a corresponding set of effects. As the scope of the subject increases, so too do

the possible effects. This dimension can also be broken down into three distinct categories:

1. the specific responses of a targeted elite in the immediate aftermath of a Supreme Court ruling
2. structural changes in political and social institutions and arrangements as a consequence of Court action
3. changes in attitudes and values of the mass population, suggesting shifts in the national political culture

Although these two dimensions—scope and effects—are independent of each other, they tend to go together. As one moves away from a focus on specific court decisions, the focus on consequences is likely to shift from the immediate responses of the affected decision-makers to consider broader institutional and cultural changes.

Most impact research, Shapiro correctly observed, focuses on the narrowest conception of task on both dimensions, that is, the immediate response by a targeted decision elite to a single major Court decision. For instance, after *Miranda*,[1] a host of scholars began measuring the degree to which police complied with the Court's ruling requiring them to warn suspects of their rights; after *Schempp*[2] and *Engel v. Vitale*,[3] impact scholars focused on the immediate responses of school boards, superintendents, and teachers. As one moves down the continua, the amount of *empirical* research declines sharply. In short, as the significance of the issues increases, their place on the research agenda of social scientists tends to decrease. It is an instance of the classic paradox of social science: scientific rigor is inversely related to significance.

Implicit in this assertion is a belief that social science is driven by a concern for technique and method and that this concern *inevitably* leads to the trivialization. Although there is much evidence supporting this proposition, I am not convinced that the argument is as general and inevitable as Shapiro implies. Perhaps I am more sanguine about the common sense of my colleagues than he is. Also there are other factors he failed to take into account, factors that from some hindsight can now be seen as important.

In the years since he offered his explanation, several things have happened: the Supreme Court has largely abandoned its activist stance toward resolving social problems,

the nature of what constitutes "good" social science has been revised, and the meaning of legal impact has been broadened in a way consistent with his arguments. Those of us who recall with fondness the heydey of the Warren Court may take some consolation in the fact that its demise may have contributed to a more meaningful social science research on law. Indeed, in retrospect, Shapiro's own perspective—arguing for more research on the Supreme Court's institutional role in American political life—may now be criticized as overly narrow, a point to which I will return shortly.

Limitations of Typical Impact Studies

Before going on to explore recent developments in impact research, I wish to reflect at some length on the shortcomings of the typical type of impact studies—those on the "narrow" end of both of Shapiro's continua. Despite shifts, these studies still constitute the bulk of the literature on court impact and continue to serve as models for research in the area. This research I will call *decision-specific*, for it attempts to trace the immediate effects of a single court decision on a targeted population identified or implied in the court decision.

Decision-specific research can be understood as the adaptation of experimental research designs to the study of the impact of court decisions. The command of the court is seen as an experiment, an effort to induce change in a targeted population. By its very nature this approach seeks to establish how much change was caused by the experimental intervention; its ideal is to hold all other factors constant except the experimental stimulus, the court decision. Since controlled experimentation is impossible, standard second-best solutions must be relied upon. There are two strategies. The most common is comparison of the same jurisdiction before and after the announced new law. An alternative is to compare jurisdictions covered and excluded by the new law.

Problems confront each strategy. The former approach is frustrated by the problem of intervening factors, and the resulting possibility of spurious causal inference. While a federal system facilitates the latter type of comparison, the

nationalization of so many legal issues reduces its applicability, and the lack of strict statistical comparability among available experimental and "control" jurisdictions further weakens this approach. Despite the obvious problems (and they are by no means unique to legal impact research), these two approaches constitute the standard in research strategies concerning impact.

There are, of course, variations; the two approaches (comparison and multiple time-series analysis) can be combined and refined. The number of possible research designs is as large as the imagination of the reader of Campbell and Stanley (1966) will permit. Indeed more than one impact scholar has published articles parsing Stanley and Campbell for legal impact researchers.[4]

It is this concern with scientific rigor--certainly a very real concern—that has nevertheless contributed to the limited value of impact studies and focused attention on secondary issues at the expense of larger ones. Let me suggest three interrelated reasons why the pursuit of rigor has had this effect: narrowness of focus, lack of theoretical relevance, and lack of practical significance.

Narrowness of Focus

To draw causal inferences, it is necessary to carefully bound the scope of research in time and space in order to reduce the likelihood that other unmeasured factors intervene between the causal stimulus and effect. Court impact researchers have tried to avoid this problem by focusing on the *immediate* aftermath of court decisions. Indeed, several of the more methodologically sophisticated impact studies have had fortuitous origins, in that research already underway was immediately turned into an experimental design after an important court decision was handed down midway through their field research. Such fortunate circumstances allow a careful *before* and after study in a way that retrospective analysis cannot. The best example of this is the study by Lefstein, Stapleton, and Teitelbaum on the effects of *In re Gault*.[5] Initially begun as a comparative analysis of two juvenile courts, the research design and purpose became a before and after experimental study in light of the *Gault*

decision, which was announced midway through their field research.

By focusing on the immediate aftermath, other related causal factors can more or less be held constant, and the specific impact of the single court decision can more easily be inferred with greater confidence. As the time frame expands —both forward and backward in time—the likelihood of other intervening and concurrent factors affecting the behavior of the target population increases, and the more difficult it is to identify the distinct importance of any single decision.

Bounding the time frame this way is a sound strategy if one wants to use sophisticated statistical techniques and is content with an analysis of the *immediate* impact of a court decision. But rarely is the immediate aftermath as important as the longer-range impact. And rarely is a single court decision likely to remain an isolated "cause" as one's perspective is broadened. To the extent that Holmes is correct—that the life of the law is not logic, but experience—courts reflect concerns that swirl about them in other arenas and respond to interests that make themselves felt in any number of ways.

As the significance of court cases increases, this likelihood of multiple sources of change also increases. Long before *Engel v. Vitale*, concerned parents in many school districts—and particularly those with a religiously heterogeneous student population—had pressed school boards to abandon religious observances in the classroom. Long before *Gideon*,[6] many states had already provided free counsel to indigents as a matter of right. Long before *Brown*,[7] black activists had organized and pressed their cause. The civil rights activism of the 1950s and 1960s may owe as much to black experiences during World War II as it did to *Brown*. In short, even the most important court decisions often express or cap a policy or trend set in motion by other prior events, and, as such, their real importance may be more symbolic than real.

I do not mean to diminish the importance of the actions of the Supreme Court, but I do want to emphasize that the methodological imperatives of "rigorous" impact studies often lead scholars to fail to appreciate a historical perspec-

tive and to exaggerate either the successes or failures of specific decisions. To the extent one is interested in all the contributing factors in the *evolution* of social change—rather than simply the specific effects of courts—it is imperative to establish a broader context and perspective. But to do this is to abandon an exclusive focus on the courts and to sacrifice method and technique. It means that the rigor of social "science" must give way to the informed judgments of the historian.

If one turns to the less dramatic but perhaps cumulatively more important policies handed down by the courts in a series of "little" decisions, the methodological problem of court impact research becomes even more complicated. There is not even likely to be any single decision on which to focus, and even if there is a distinctive decision, it is likely to be an incremental advance in a long series of prior decisions. To the extent this takes place—and this is the classic pattern of both the common law and constitutional law—the rigorous methodology of experimental research will be wholly inapplicable. No single and decisive "experimental intervention" can even be identified; rather there is a long series of decisions that, taken together, may spell out a change in policy. This process of change is further complicated—from an impact research perspective—by the possibility that other governmental bodies (legislature, administrative agencies, and so forth) may also have made an effort to shape the emerging new policy. If I am correct, then the methodological idea of impact research is altogether ill-suited for all but the most atypical of court-generated policies.

Having criticized these decision-specific impact studies because they focus on the atypical, let me immediately turn around and defend them for precisely this reason. It is perfectly reasonable, it seems to me, to want to focus on the especially important decisions, and by and large this is what impact researchers have done. That the emergence and demise of "court impact analysis" within political science roughly parallels the era of the Warren Court (with some slight lag) is not surprising. Under Chief Justice Earl Warren, the Supreme Court became accustomed to handing down "big" decisions on a regular basis, and public law scholars adapted to this by developing a new subfield, impact

research. The results-oriented jurisprudence of the Warren Court invited this type of empirical research. Ironically, the findings tended to point to a less efficacious Court than the chief justice and his supporters would like to have imagined. The decline of impact analysis—at least in political science—in recent years is also not surprising, given the directions of the "new" Court. Despite occasional outbursts in the "grand style," the Court in recent years has tended to avoid big decisions opening up new areas of constitutional law.

Lack of Theoretical Relevance

If statistical technique is king of the social sciences, theory is its queen, and for this reason many impact studies have attempted theoretical relevance. Despite this, efforts at theory-building in impact research have failed. Some have failed because they adopted an inductive approach to theory-building that ultimately complicates and weakens rather than simplifies and strengthens theory construction. Others have failed because they have attempted to adopt and apply theory from other disciplines and in so doing have weakened both their examination of the impact of court decisions and their contribution to theory construction and testing. Let us examine each of these problems.

One theoretical tradition in social science is inductive; its aim is to generate a theory from the accumulation of verified propositions. It often proceeds through the generation of propositional inventories, which ideally can be arranged in some sort of hierarchical and structured way so as to build toward a theory. I may reveal my bias against this approach in general when I say that this effort has not yielded any meaningful theory of legal impact. Indeed, I think that those studies most explicitly hoping to contribute to the "building of a theory of court impact" through the accumulation of verified propositions about the consequences of court decisions are, in retrospect, caricatures of social sciences. As an example, one painstaking review of the available literature on court impact resulted in the accumulation of 245 supported propositions about the Supreme Court, most of them of such a low level of generalization that the label theoretical must be stretched beyond recognition to accommodate them.[8] Another more typical such study

focused on school integration in a southern state? Here the authors proceeded to announce and test a variety of hypotheses that at best were only loosely tied together, and again at an extremely low level of generalization (for example, integration is indirectly related to the percentage of blacks in the school district).

Both of these studies proceeded on an ad hoc basis, and even the most casual reader could quickly discover that the number of possible hypotheses—to be turned into propositions if they are verified—are limited only by the number of variables one could imagine. In short, with such raw empiricism there is no closure, and, above all, theory demands simplification and closure. Not being informed at the outset by any theory, the "hypotheses" that were tested reflect as much on what data were readily collectable, measurable, and quantifiable as on any coherent theoretical concern. In both cases, the final result was a long catalogue of "supported hypotheses," proffered in an ad hoc way, and not related to each other in any systematic fashion.

Another theoretical tradition—this one a deductive approach—is followed by other impact scholars. Rather than trying to develop a distinct theory of impact through the inductive process of accumulating propositions, these scholars have sought to test existing social science theory on their impact data. This approach is much more compatible with standard pursuits of social science, though it, too, has its limits. How fruitful have these efforts been? And, in retrospect, has the effort been worth it? Here, too, I am skeptical.

The problem arises because courts are not in the business of accommodating themselves to the theoretical concerns of social scientists. As a result, the effort to translate a theory derived from social psychology, large-scale organizations, or communications to the immediate circumstances of a court impact analysis often can be accomplished only at the expense of drastic oversimplification of the theory. Often a complex theory must be reduced to a single testable "hypothesis," which in turn must be tested using data that only indirectly speak to the concerns of the theory. Thus, there are the twin problems of the need to simplify the theory to the data at hand, and the need to squeeze the

available data to fit into the mold of the theory. The result is that both the empirical and theoretical analyses suffer.

This is not to say that social theory cannot and should not *inform* impact studies. Clearly it should. My point here is that legal impact analysis itself is not likely to make any significant contribution to the development or testing of social theory, and the efforts to make a study more "classy" by imbuing it with theoretical significance have usually failed. The concern for "theory" has often been pursued at the expense of an expanded and more interesting descriptive analysis.

Whether a theoretical approach is inductive or deductive, impact analysis is not likely to make a significant contribution to social theory. To proceed as if it will only serves to undercut other valid and useful benefits impact studies have to offer.

Lack of Practical Significance

Political scientists often make a distinction between *process* analysis and *policy* analysis. The former focuses on a single institution—for example, the legislative process or the executive process—whereas the latter focuses on issues. Process analysis is in a manner of speaking vertical. It examines how an organization functions, its formal and informal norms, its derivation from announced goals, its need to sacrifice them to pursue organizational maintenance. Ultimately, I suppose, the purpose of such a focus is to understand how and why an institution survives. On the other hand, policy analysis is horizontal. It focuses on the life histories of issues, how they are generated, publicized, wend their way through any of several political processes toward adoption or rejection, how they are implemented, and what their impact is.

Legal impact studies tend to fall between these two foci, and as a result they may fulfill the needs of neither. They focus on process in that they examine the actions of a single institution—a specific court or set of courts. Yet because they focus on only one or a handful of decisions—and usually highly atypical ones—these studies are likely to yield an incomplete and skewed portrait of the judicial process. On

the other hand, impact studies also focus on policy in that they go beyond the examination of *policy-making* to explore policy *implementation* and impact. But here, too, they are limited in that they tend to focus exclusively or disproportionately on only one source of policy, the court decision. Yet in any complex set of issues policy is likely to be formulated and shaped by several different institutions. For example, school integration policies are shaped not only by court decisions, but also by local school board initiatives, HEW (and carrots and sticks), Department of Justice negotiators, state legislative mandates, and local public interest groups, as well as federal judges. Such policies are tossed back and forth between the courts, Washington, the state, and local school boards. While law, litigation, and the threat of litigation are never far away and certainly play a major part in the process, research that focuses only on the impact of *court* decisions yields an incomplete and artificially fragmented picture.

Policy analysis would see the courts as but one of several policy initiators and policy-makers. The more practical and relevant research in this area is, the less likely it is to limit its focus to the impact of *court* decisions.

As a political scientist I am embarrassed that my discipline has not played a major role in research on the effects of affirmative (court or otherwise) racial integration. It seems that the traditional preoccupation with the U.S. Supreme Court and the methodological imperatives of impact research I have just discussed have contributed to the lack of research of practical use to politicians, school boards, educators, and courts. With but few exceptions, political scientists have ceded this important research area to sociologists, educators, and lawyers.

This same narrowness of focus is found in many of the studies of the impact of *Miranda*, the Supreme Court ruling requiring that police officers warn suspects of their right to counsel and to remain silent. Although a number of excellent studies have measured the immediate impact of this decision, these have not been followed by many others that have tried to place *Miranda* and other related decisions in a broader context, as part of a widespread trend toward increased police professionalism generally. This broader policy focus

would down play (but by no means ignore) the importance of specific court decisions.

Alternative Approaches

So far I have spoken about only one type of impact study, the immediate impact of a specific court decision. If I am correct in my belief that this type of research was a consequence of the activism of the Warren Court, then my remarks may be of limited value for the present, because the subfield of impact studies—at least within political science—seems to have disappeared with the Warren Court. Dimming of the spotlight on the United States Supreme Court has not, however, meant an end to *all* research and scholarly interest in the impact of law on society. Indeed the demise of the activist court may even have fostered attention on impact problems of greater social significance. For whatever reason, there are encouraging signs that a lively and intellectually invigorating and socially significant agenda for impact research has been set, and it is to this work I now want to turn.

Until now my remarks have focused on the dangers and limits of narrowly conceived legal impact research. No doubt I can now be criticized for overenthusiasm about research of the opposite sort, the pursuit of ambiguous and global questions, questions that some of my colleagues insist are more appropriately addressed by political and legal *philosophers* than social *scientists*. Still, let me pursue my point and suggest that these questions could quite profitably set the scholarly agenda for future legal impact research.

There are two distinct sets of questions here. At root, both of them are concerned with what constitutes the good society and the proper means for pursuing this goal. More specifically, one question deals with the *capacity of courts* to solve social problems, and the other deals with the *nature and consequences* of legality, the costs and benefits of relying on law to structure human relationships. Both of these concerns have been addressed recently in stimulating works by thoughtful scholars, and if these works have not provided definitive answers, they have identified the issues and focused debate.

The Capacity of Courts

To facilitate my discussion here it is useful to discuss two recent books, which, while in agreement in many points, nevertheless argue quite different theses and come to diametrically opposite conclusions. One, by Donald Horowitz (1977), is *The Courts and Social Policy*; the other, *The Politics of Rights*, is by Stuart Scheingold (1974). Both books are important studies of the ability of courts to affect social change, but both deal with the topic on a level quite different from the decision-specific impact studies discussed above.

In *The Courts and Social Policy*, Horowitz argues that the courts have overextended themselves. His book constitutes an indictment against judicial activism, an argument heard frequently within recent years. What is distinctive about his argument is that his case is built on grounds quite different from most other critics of judicial activism. Rather than challenging the legitimacy of the political activism of an appointed judiciary, he challenges the *capacity* of courts to successfully make and implement policies. His thesis is that the courts are not only inappropriate but also ineffectual policy-makers, and that by trying to make social policy, they have created more problems than they have solved. The school desegregation cases, he argues, set in motion a revolution that has had lasting reverberations in all areas of the law. He argues that in a great many areas the courts have expanded doctrine beyond recognition, a process that has been facilitated by the abandonment of several time-honored restraints imposed by strict requirements of jurisdiction, ripeness, and standing. The net result, Horowitz continues, is that courts are now almost interchangeable with legislatures or other admittedly policy-making institutions.

This expansion, he argues, constitutes a major transformation of the judicial role, away from judges-as-adjudicators to judges-as-"problem-solvers." The recent trend, as he sees it, violates several traditional and distinctive features of adjudication, features that limit judges' abilities to solve complex *social* conflicts. They are:

1. Litigation (and particularly appellate litigation) focuses on the atypical and distinctive and, as such, does not provide a good basis for making judgments about the typical and routine.

2. Legal argument is focused and narrow; courts consider issues in terms of preexisting rights and duties, and their power lies in the authority of their reasoning. As such, they are not equipped, as are legislatures, to consider a broad array of options, assess trade-offs, weigh the costs and benefits of each, and have the ability to use any of several types of incentives. In short, the courts possess neither purse nor sword.
3. Adjudication is piecemeal; lawsuits between two parties yield a limited perspective and information on a problem, and in coming to a decision a court acts on partial and imperfect information. The limited impact of individual decisions means that even if the court makes a mistake, it will only affect a limited number of people and can be easily modified and corrected in future decisions. In contrast, social policy calls for grand plans that affect large populations.
4. Courts are reactive; they must wait for issues to be brought to them. As a result, they cannot effectively anticipate and plan for social change.
5. Fact-finding in adjudication focuses on specific historical and "legal" facts and is ill-adapted at finding "social" facts (recurrent patterns of behavior), a necessary precondition for formulating policies effecting *social* as opposed to individual change.
6. Adjudication makes no provision for *systematic* review and is best equipped to remedy specific injustices upon a *preexisting* set of rights and duties.

These traditional limits on the ways courts receive and consider issues, Horowitz argues, necessarily impose limits on the capacities of the courts. Despite this, contemporary events have caused the courts to ignore these built-in limits and to dive headlong into policy-making. The results, he argues, are predictably unsuccessful. The bulk of his book consists of case studies that he asserts demonstrate the unsuccessful results of judicial overreaching. These stories, he seems to be saying, lead to a self-evident conclusion, that the solutions sought by the courts exacerbate rather than ameliorate problems.

His book presents and forcefully develops this important thesis; nevertheless, his book does not lead inexorably

to the conclusions he thinks it does. One shortcoming of the case studies is that they are written as advocates briefs, not social science. People familiar with events in the several case studies he develops will find that the events are described in less than an evenhanded manner, and even those who are not familiar with them can find evidence of this in the use of his language.

This criticism aside, the more fundamental problem is that Horowitz makes a comparative assessment without offering comparative data. Although he convinces the reader that the problems the courts have tackled are immense and complicated and that the courts have not found neat remedies, he does not show that the problems are better handled by other agencies of government, a claim central to his thesis. There is nothing in his study to suggest that the difficult and painful problems he examines could have been better handled elsewhere. Indeed, other sources reveal considerable evidence to suggest that one of the reasons these issues reached the courts was that other agencies were either unwilling or unable to tackle them. Unless he prefers that the problems covered in his case studies not be tackled at all (and I suspect that this is not far from the mark in several of them), his evidence fails to support the conclusion that the courts are ineffectual problem-solvers.

To show that court intervention has failed to resolve the problems, and in fact created still others, is not adequate to convince the reader that the courts do not have the capacity to deal with the problems he describes. Complicated, intractable problems do not lend themselves to neat and simple solutions, whether by courts *or* legislatures. To be convincing, the capacity argument must be pursued on a comparative basis, and it should also be placed in historical perspective. While Horowitz has shown that the courts have not achieved immediate successes, given the enormity of the problems, this is hardly surprising. No institution could. He offers no evidence that courts are any less capable of resolving these issues than are other institutions.

Furthermore, the view commensurate with his concern requires broader historical perspective. How would he assess the capacities of the courts in these areas twenty-five or fifty years from now? Definitive assessment in the midst of

turmoil is not likely to lead to balanced assessment. For instance, the courts may serve an important catalytic role in effecting social change, even though they themselves may not bring it about directly.

This last point is developed at some length by Stuart Scheingold in *The Politics of Rights*. Scheingold tends to agree with Horowitz that courts by themselves are ineffectual in bringing about solutions to complex social problems. He, too, shows that courts possess few resources to effectively implement their decisions. Nevertheless, he does not conclude that the courts should refrain from making rules in complex areas, even where the newly announced rights are not likely to be effectively provided.

The law, Scheingold argues, is a powerful and efficacious symbol, and as such, it can and does serve as a powerful institution around which to mobilize political activity. By themselves, litigation and court rulings are likely to be inefficacious, he admits. But as catalysts of mass arousal and political action—whether in the streets or at the polls—they can serve an important strategic function. To demonstrate this thesis, Scheingold cites numerous instances where court victories—hollow in themselves—have been used as the impetus for overt political activity that did lead to substantial changes in policies and practices.

The differences between Horowitz's and Scheingold's conclusions derive largely from their divergent political values, as well as from how broadly each has cast his intellectual net. Horowitz sees law and litigation and court decisions as *alternatives* to and different from politics, and he concludes that courts are not effective in achieving essentially political purposes. On the other hand, Scheingold sees litigation and court decisions as political tools, instruments that, if used properly, can play important roles in achieving political purposes. (Of course, Scheingold identifies a problem with this court role in that lawyers rarely share this vision and are reluctant to be used as "tools" or instruments of political strategists. Instead they tend to see litigation as a principled alternative to the vulgarity of rough and tumble politics.)

Neither Horowitz nor Scheingold provide definitive answers to the problems they raise (both studies are barely

veiled polemics), but the problems they address are important. Each raises a different argument about the impact of the courts on social policy and, in the process of doing so, shows how important it is to move beyond particular court decisions and place one's research in a broader, political context.

Emergent Legality

The second component to what I see as the new research agenda has to do with what I call the issue of emergent legality, the process of expanding legal relationships. Again it is useful to examine the issues by reference to concrete works. Here my protagonists are sociologist Philip Selznick on one hand, and the late Lon Fuller, a legal philosopher, on the other. The debate is more an artifact of my imagination, in that nowhere in the writings of these two scholars have they addressed each other, as I have them doing here. Still, they do deal with similar issues and, in doing so, come to quite different conclusions.

A recurrent theme in Selznick's writings (1961, 1969) is a concern with human dignity. Law, according to Selznick, captures the highest human aspirations and impulses, and, as such, the *expansion* of law represents an increase in human dignity. Law, Selznick argues, represents the taming of raw force—the substitution of confrontation with reason, and dependence with autonomy. If this sounds normative and vaguely like a natural law argument, it should. Selznick's ideas are related to modern psychological natural law theorists like Erich Fromm; Selznick sees social life as a striving toward the fulfillment of universal human ends, needs that man implicitly seems to recognize and seek. Through the expansion of law, he argues, these human ends are met, social institutions mature, and society becomes more responsible and responsive. It is through law, he argues, that human beings can fulfill their potential and obtain a full measure of dignity. To him, the task of the social scientist is to trace the unfolding of this evolutionary scheme and relate it to social conditions.

In contrast is the position of Lon Fuller (1969), who is skeptical of the capacity of law to effect enduring and meaningful social relationships. Fuller posits two different

principles of association, two types of forces that bind relationships together. One he labels the principle of shared aspirations or commitments, the other the legal principle. Most organizations, he asserts, possess elements of both, but by isolating them and treating them as polar opposites he is able to examine the essential features of each, elucidate the tensions inherent in them, and in the process provide insight on the meaning and value of human relationships.

Shared commitments are, Fuller asserts, the principles that bind a great many private and voluntary organizations together. Often such relationships exist as ends in themselves, rather than as joint means to secure an individual end. That is, much group behavior is expressive action in its own right, not simply a means to an end. Examples of organizations held together by shared commitments or aspirations include the family, the church, the school, and perhaps many business relationships.

In contrast is the organization based on legal principles. Here organized activity proceeds by reference to rules, and relationships are designated by formal rules of duty and entitlement. This form of association offers predictability and supplies stability through the elaboration of rights and duties.

Of the two types of relationships, Fuller clearly prefers that which is based on shared commitments or aspirations; it is more intense and more meaningful in the fullest sense of the term. In contrast, he seems to be arguing, association based on legal principles involves a "minimalist" view of relationships. The web of legality draws an invisible and alienating veil between people; the relationship is filtered through and, as a result, shaped by the law. Stewart Macaulay (1963) has found that businessmen rarely write good contracts, and when contractual disagreements arise, they do not bother to insist on their "legal rights." It is not carelessness that leads to this, he discovered. Rather, it is the desire not to let "legality" get in the way of friendships and the desire to maintain future friendly relationships.

Both Fuller and Macaulay seem to be suggesting that at its root law necessarily breeds a distrust among people. Both seem to be saying that laws exist because we do not trust our fellows. It is for this reason, Fuller is suggesting, that "the

frigid legal atmosphere" can and does impoverish relationships, for intense and valuable associations must be based on trust. Fuller asks, "May there not be in human nature a deep hunger to form a bond of union with one's fellows which runs deeper than that of legally defined duty and counter-duty?" (p. 21).

This is an especially compelling question to Fuller because he sees modern societies set on a course of galloping legalism, a trend that he asserts "feeds on itself." No doubt this course is usually correct, he continues, but nevertheless its cumulative effect may be to "push us along a path we do not like and would not have entered so blithely had we known where it was taking us."

I trust that by now my intent is clear: there exists an important debate between Selznick and Fuller, between the celebrant of the expansion of law and the more cautious and dubious observer.

This debate, I submit, is ultimately the central issue to be faced when considering the impact of law. It invites us to ask how the law affects the quality of human relationships as it expands into new realms. Fuller in particular asks us to consider the costs *as well as* the benefits of expanding legality. This concern not only draws attention to the impact of the courts' decisions, but perhaps more importantly to the many other ways law affects our lives, through reliance on contracts, definitions of jobs, unionization, grievance proceedings, and so forth. At a minimum, Fuller suggests that we should make problematic and hence the subject of empirical investigation what Selznick takes for granted, that expanding legality enhances human dignity.

Summary and Conclusions

In this brief paper I have examined three ways in which sociological scholars have conceived of legal impact. The first—decision-specific research—I have rejected largely because of its narrow focus and its lack of theoretical and practical significance. I have suggested, however, that to the extent that court impact studies do offer practical and useful results, they are likely to become policy studies and move beyond the exclusive focus on the courts to consider judicial

policy-making in the light of other policy-making institutions as well.

I then suggested two additional approaches that raise what I take to be more fundamental questions. The first issue has to do with the capacities of courts. Answers to the questions raised here, however, appear to be determined by how narrowly or broadly the researcher casts his or her intellectual net, and this in turn may be determined in part by the researcher's political values.

The second set of issues has to do with the consequences of expanding legality—whether through court order or otherwise. Here I follow Lon Fuller and suggest that we should consider as problematic the consequences of expanding legality. Typically, discussions of law and social change assume that expanding legality yields an obvious good; Fuller suggests that a more balanced view might lead to a more mixed assessment, particularly as we consider the areas where the law increasingly enters the realm of what traditionally has been regarded as "private."

What I have not done here is suggest a methodology and set of techniques for pursuing these questions, or summarize what we know and do not know about these questions. In reference to the former, it appears that there is some chance that the greater the concern with methodology and technique, the greater the likelihood that these concerns will drive our investigations and squeeze out the concern for theory and substance. Hence, I have remained silent and now will only urge that a multiplicity of methods and techniques be used. In reference to the latter, I will be contented if I have succeeded in asking some of the right questions.

Footnotes

1. Miranda v. Arizona, 384 U.S. 436 (1966).
2. Abington School Dist. v. Schempp, 374 U.S. 203 (1963).
3. Engel v. Vitale, 370 U.S. 421 (1962).
4. Richard Lempert, "Strategies of Research Design in the Legal Impact Study: The Control of Plausible Rival Hypotheses," *Law and Society Review*, 1 (1966), pp. 11-21. *See also* James P. Levine, "Methodological Concerns in Studying Supreme Court Efficacy," *Law and Society Review*, 4 (1970), pp. 583-92.
5. *In re* Gault, 387 U.S. 1 (1967). For an analysis of the impact of this case in several geographical areas *see* Norman Lefstein, Vaughan Stapleton, and Lee Teitelbaum, "In Search of Juvenile Justice: *Gault* and Its Implementation," *Law and Society Review*, 3 (1969), pp. 491-562.
6. Gideon v. Wainwright, 372 U.S. 335 (1963).
7. Brown v. Board of Educ., 347 U.S. 483 (1954).
8. Stephen L. Wasby, *The Impact of the United States Supreme Court* (Homewood, Illinois: The Dorsey Press, 1970).
9. Harrell R. Rodgers, Jr., and Charles S. Bullock III, *Coercion to Compliance* (Lexington, Massachusetts: Lexington Books, 1976).

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On Doing a Values Study of a High Court Decision

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So much depends
upon
a red wheel
barrow
glazed with rain
water
beside the white
chickens.

William Carlos Williams

Introduction

My major purpose in preparing this paper is to discuss in some detail the processes involved in doing a values study of a high court decision. I will focus on a paper I wrote on the cultural values and beliefs behind the United States Supreme Court's 1977 decision in *Ingraham v. Wright*,[1] in which the Court held that the use of corporal punishment in the public schools did not violate the Eighth and Fourteenth Amendments of the United States Constitution.[2]

Were it not for the fact that several of the participants at the international seminar in Honolulu, Hawaii, where I presented my values study of the *Ingraham* case nearly two years ago, urged me to describe the process I followed in preparing the paper, I probably would not have considered the manner in which I prepared the paper particularly notable. But several participants, particularly those from Australia and the United States, appeared to feel that my paper represented an outstanding example of a values study; they suggested that a description of the steps I took would be valuable so that others interested in the application of cul-

tural jurisprudence as a mode of inquiry into high court decisions might be able to learn something from the procedure I used. It is therefore my hope that social scientists, school practitioners, and legal scholars may find something of value here that they could use either in whole or in part to enrich their understanding and to provide a fresh perspective on the extraordinarily complex and often hidden meaning behind a high court's decision. I would also hope that the study and application of jurisprudential analysis will further our knowledge of the intended (and unintended) impact of court decisions on education in this country.*

In the following discussion of how to do a values study, I intend to describe both the general principles of what is known as cultural jurisprudential inquiry and analysis as well as some of the techniques I used in researching and

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*The way in which certain segments of our society viewed the *Ingraham* decision is a good example of the discrepancy that can occur between what the Court intends to say and what some observers perceive it as saying. It is clear that the Supreme Court was cognizant of the seriousness of the disciplinary problems in our public schools and intended the decision in *Ingraham* to be a reaffirmation of the traditional authority of school administrators and teachers in controlling the behavior of students. Most school officials applauded the Court's decision, viewing it, as the Court had intended, as reaffirming their authority to prescribe and control conduct in the schools. But some people strongly disagreed with the decision, choosing to interpret it to mean that teachers were free to use physical force to discipline misbehaving children under their control.

Most political cartoons that appeared in newspapers after the decision was announced depicted gorilla-like teachers bashing or threatening to bash small children at the slightest provocation. For example, an Oliphant cartoon shows, in the first frame, a little boy looking up a female teacher and saying, "Teacher is a dummy! Teacher is a dummy!" In the second frame the teacher looks down at the boy. In the third frame, the teacher yelis, "Heeeaahh!" and gives the boy a karate kick to the head, followed in the fourth frame by a karate chop to the top of the head, followed in the fifth frame with the teacher administering the coup de grace with her purse. In the last frame, the teacher stands over the pulverized figure of the boy at her feet, and with eyes cast upward, exclaims, "God bless the Supreme Court!".

writing the paper. I also intend to make a few substantive comments and observations about cultural values and beliefs reflected in the *Ingraham* decision that I derived in part from a discussion of my paper at the Honolulu seminar as well as some ideas that have occurred to me in reading and thinking about the case off and on over the last two years.

Values Inherent in Laws

My introduction to the study of values and beliefs inherent in and reflected by the laws and legal systems of the country occurred nearly two years ago when I was invited to present a paper at an international seminar held at the East-West Center in Honolulu, Hawaii.* The seminar was entitled "Problems of Law and Society: Asia, the Pacific, and the United States," and was jointly funded by the National Endowment for the Humanities and the Culture Learning Institute of the East-West Center. The thirty or so people who presented papers at the conference represented the fields of law, sociology, political science, anthropology, and education. (I was the only person from education.) Nearly half the social scientists and legal scholars attending the seminar were from the United States; the others were from several Asian and Pacific countries including Australia, the Philippines, Malaysia, Nepal, India, Pakistan, Japan, Singapore, and South Korea.

The major purpose of the seminar was to bring together legal scholars and social scientists in a cross-cultural setting to discuss the cultural learning implications of landmark judicial decisions or major legislative enactments to "discover how the laws and legal systems of particular cultures illumine

*The East-West Center—officially known as The Center for Cultural Technical Exchange between East and West—is a national educational institution established in Hawaii in 1960 by the U.S. Congress to promote better relations and understanding between the United States and the nations of Asia and the Pacific through cooperative study, training, and research. Center programs are conducted by institutes addressing problems of communication, culture learning, environmental policy, population, and resource systems. The center is located on land adjacent to and provided by the University of Hawaii.

deeper cultural thought and value patterns of those cultures."[3] Each participant was instructed to select* a case study and write a thirty-page manuscript "giving the essential facts of the case, but going on from there to show the cultural assumptions, concepts, values, outlooks, and feelings that constitute the background and real meaning behind the individual decision."

If one is going to engage in efforts to show how certain significant laws of a country express or reflect its basic values or beliefs, one must accept certain assumptions about the nature of law itself, assumptions that form the conceptual and theoretical framework of cultural jurisprudential research and writing. These assumptions about the nature of law (from a jurisprudential perspective) were well expressed, I believe, by John Walsh, coordinator of the seminar and a research associate with the Culture Learning Institute at the East-West Center:

> Laws do not ordinarily come into force of effect in the first instance in ways that are completely random and arbitrary. That laws do sometimes come into force in this way, as for example in the edicts of a tyrannical despot or in the decisions handed down by a demented judge, only highlights the general expectation that the laws will be reasonable, that is, that they will be based on common sense, experience, and good judgment. This is only another way of saying that the laws will follow some pattern of logic, that they will be consistent with one another, and that they will be validated or legitimated by reference to prevailing beliefs and values.
>
> Neither do laws already in existence change in purely chance or quixotic ways. Put differently, the laws, either as they are or as they will become, do not

*Cases were to be selected "because of their importance, impact, and significance in reaffirming established ideas and values or in breaking with established ways of seeing and doing things."

> explain themselves. The laws are a surface expression, reflection, or manifestation of that deeper and broader thinking and valuing in which they are rooted and out of which they take form and develop. A major law that contradicted or violated one of the country's more basic perceptions or tenets would either be quickly changed, or it would be disregarded, or it would lead to a kind of cultural schizophrenia.[4]

While it is virtually impossible to conduct empirical studies proving that the Supreme Court based a particular decision on certain historic and/or contemporary values and beliefs in our society, the "truth" of these relationships will depend upon the

> power of the observers to penetrate below the surface phenomena and on the quality of the evidence they are able to advance in support of their insights. The fact that different observers might well arrive at different conclusions, does not diminish the importance of this mode of analysis . . .; it only emphasizes the fact that in this area the complete truth—if indeed there is any such thing—lies in putting together a partial truth or the best approximation.[5]

The Method of Inquiry

Unlike most of the other participants at the seminar, I was being exposed for the first time to what I came to know later as the substance and methodology of cultural jurisprudence. And so, unlike many of the legal scholars and social scientists at the conference, I was not constrained in my efforts to do a values study by the specialized methodologies and substantive orientation of their particular disciplines. My unfamiliarity with this method of inquiry actually became an advantage. I took the assignment as it was presented to me—at face value—and attempted to meet what I considered to be the intent of the assignment as best I could. The instructions provided the participants, though brief, were

quite specific in defining the kind of case that was to be selected for a values study: a landmark judicial decision or major legislative enactment.

As luck would have it, the Supreme Court handed down its decision in the *Ingraham* case just six weeks before I was invited to present the paper. I had no knowledge of the case prior to reading about the Supreme Court's decision in the newspaper. Nevertheless, I chose the case even before reading the Court's decision, because I felt that it might lend itself (though I knew not how at the time) to analysis from a cultural values and beliefs perspective. I selected the case for another reason as well: it seemed particularly suitable for dramatization and videotaping for use in educational television and public broadcasting, one of the uses the Culture Learning Institute intended to make of some of the papers presented at the seminar. (My paper was not selected for this purpose.) It also seemed to me that the *Ingraham* decision reflected a changing mood in this country, a desire, if you will, to return to the relative tranquillity of the fifties.*

I obtained the slip opinion on the *Ingraham* case from the University of Oregon Law Library and read the case two or three times to become acquainted with the legal arguments in support of both the majority and dissenting opinions. I also read both appellate court decisions—the original panel opinion[6] and the rehearing en banc[7]—for much the same reason. At this early point in the work, although I grasped the legal issues in the case, the cultural values and beliefs that lay behind the decision remained almost totally obscured. The only exception was the forming of some tentative ideas concerning national attitudes and values pertaining to

*Indeed, according to some artists and critics writing in 1977, we had already returned. "The amazing thing is," said Andy Warhol in an interview in *U.S. News & World Report* (June 27, 1977, p. 57), "that we seem to have turned back the clock in this country. When I go out and stand on a street corner, everything and everybody looks just like they did in 1959. It's like 18 years just disappeared." Alan M. Kriegsman, movie critic for *The Washington Post* (June 19, 1977), felt much the same way: "It's hard to escape the feeling of facing backwards these days. Seeing 'Annie Hall' recently . . . left me with the oddest sensation of chronological vertigo."

corporal punishment suggested by the Court's statement that "a single principle has governed the use of corporal punishment since before the American Revolution: teachers may impose reasonable but not excessive force to discipline a child."[8] That statement stimulated me to begin to read books about corporal punishment in the public schools and about the history of public education in this country, particularly during the colonial and precolonial period. Nevertheless, I realized that I needed more information. I needed to know more about the facts and issues—particularly the human issues—in the case.

In Search of Insight

The Court's opinion was constructed—as most court decisions are—to emphasize the legal issues in the case and deemphasize and in fact depersonalize all the human issues. I somehow felt that unless I was able to better understand the human issues, I would not be successful in my efforts to do an analysis of the values and beliefs behind the majority opinion in the case. I needed to obtain copies of the *amicus curiae* briefs on behalf of both the petitioners and respondents in the case as well as the briefs for petitioners and respondents.[9] I also needed to obtain a copy of the transcripts of the trial. During a trip to Washington, D.C., on other business, I went to the United States Supreme Court Building where I obtained copies of the briefs and the transcripts of the trial from the Supreme Court Library. Even if I had not been able to obtain the briefs directly in this way, United States Supreme Court records and briefs are available on microfiche in most law school libraries.[10] I was not only able to incorporate some of the material I read in these briefs directly into my paper, but the reading of them significantly enhanced my understanding of the legal issues involved in the case. In addition, the briefs stimulated my thinking regarding some of the underlying historical and contemporary values and beliefs that may have contributed to and been reflected in the majority opinion in the case.

I was also able to obtain the transcripts of the trial, which had not yet been returned to the United States District Court for the Southern District of Florida where the case was tried. But had they not been available at the Court, it would

have been possible for me to obtain a copy of them by writing directly to the district court.

The reading of the actual transcripts of the trial was one of the most significant events in my initial research on the case. For me, they provided a strong sense of immediacy regarding the nature and extent of the use (or should I say abuse) of corporal punishment at Drew Junior High School in Dade County, Florida. I was shocked and angered by much of what I read regarding the frequency and severity of the paddlings that were administered to the students at Drew. I was also deeply moved by much of the testimony I read. One particularly shocking section of the testimony is by a thirteen-year-old student at Drew who describes a savage beating he sustained at the hands of the administrative assistant to the vice principal.* Reading that passage caused me to feel an almost overwhelming sense of outrage

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*So he [the teacher] put my number on the board. So when Mr. Barnes came, he asked for me and took me to the office and told me to hook up.

Q What did he mean by "hook up"?

A Grab a chair, you know. The chair, he means by hooking up on the chair.

Q In preparation to being paddled?

A So I refuse. I told him, I say, "Mr. Barnes, I didn't do nothing; that's why I refuse to take a whipping."

Q What did he do?

A So he told me, say, "You are going to take this one." I said, "Mr. Barnes, I didn't do nothing. I'm not taking no whipping." So I was leaning over the table and I said, "I'm not taking a whipping," and I was hit across the head with the board. He was hitting me across the head with the board, and my back and everything.

Q He was whipping you where?

A Across the head, with the board, he was hitting me all across the head and on the back. I was begging him for mercy to stop and he wouldn't listen. So he had some chairs in there and I was falling in the chairs as he was hitting me with the board. Then after a while he took off his belt and then started to hit me with the belt and hit me with the buckle part, and tears was coming out of me. (Transcripts at 594-95.)

against the person administering the beating while at the same time deep compassion for the boy receiving it.

Reading the transcripts gave me a feeling for the case that I was unable to obtain from reading the opinions of the trial court, the appellate court, or the Supreme Court. I do not wish to suggest that one must necessarily generate strong feelings to do a values study of a high court decision, but I do believe that one must develop a sense of the human attitudes, emotions, and experiences involved in the case. To attempt a values study without developing a feeling for those involved would be like trying to describe the emotional and intellectual impact of *Hamlet* by reading about the play rather than actually reading it (or better still seeing it) for oneself.

This part of the process of preparing my paper on *Ingraham* was intellectually and emotionally exciting, but it was at the same time extremely frustrating. It was exciting because I was beginning to see more clearly how conflicting legal rationales and previous court decisions were used by both sides in the case to support arguments either for or against the use of corporal punishment in the public schools. I also spent much time thinking about the legal aspects of the case in relation to the human perspectives that I had gained by reading the transcripts of the trial. It was a period of contemplation not of *"things* only . . . , but likewise and chiefly the *relations* of things, either their relations to each other, or to the observer, or to the state and apprehension of the hearers."[11]

This was also a time of frustration, indeed at times high anxiety, because of not knowing how to go about linking the legal and human aspects of the case with the "cultural assumptions, concepts, values, outlooks, and feelings that constitute[d] the background and the real meaning" behind the majority opinion. Furthermore, I was still not able to see clearly what concepts, values, outlooks, and beliefs in our society lay behind or were reflected in the majority opinion. I was at that point in the process of thinking that Alfred North Whitehead describes as "the state of imaginative muddled suspense which precedes any successful inductive generalization." Much conscious and unconscious thought had to take place before the first few embryonic concepts about the

method and substance of the values study began to take shape in my mind. Had I perhaps more experience in thinking about laws and their relation to values and beliefs in society, the time required for me to develop some of the concepts I used in my paper might well have been shortened. But probably everyone doing a values study of a high court decision must experience this "state of imaginative muddled suspense" as a necessary prelude to arriving at insights. A period of painful gestation is necessary before one is able to bring order to seeming disorder, to see patterns and relationships not seen before, and to "urge the mind to aftersight and foresight. . . ."[12]

My first effort at trying to describe the underlying values and beliefs in American society as reflected in the *Ingraham* decision was to focus on the words Justice Powell had used in writing the majority opinion. I noted that Powell had used words such as "history" and "tradition" numerous times in his opinion, which I came to see as reflecting the Court's present conservative disposition. Of the majority opinion's reasoning I wrote as follows:

> In determining that the Eighth Amendment does not apply to corporal punishment of schoolchildren, the Court's majority draws on "the way in which our traditions and our laws have responded to the use of corporal punishment in public schools." The majority cursorily outlines the historic precedents for the practice, citing the Colonial period as its source in America. The majority's reasoning here is clear: because corporal punishment in the schools has historic precedents both in social practice and in common law, which of course reflects social practice, that heritage cannot be tampered with, especially since corporal punishment is still in use today. A similar line of reasoning is evident in the majority's assertion that the eighth amendment applies only to criminals. The majority found "an inadequate basis for wrenching the Eighth Amendment from its historical context and extending

> it to traditional disciplinary practices in the public schools."[13]

I found additional evidence of the Court's respect for heritage in several passages from Powell's opinion that emphasized local control of education, respect for established institutions, respect for traditional authority, and the minimization of intrusion of the federal government into areas of traditional state and local concern. Although discovery of cultural values and beliefs of the majority opinion through analysis of the language of the opinion may have been possible for a philologist or cultural linguist, it soon became clear to me that I really didn't have anywhere to go with this line of analysis. Furthermore it seemed to me that I was stating some fairly well-known facts about conservative ideology in this country, while my efforts to uncover deeply held beliefs and values in our society were falling far short of my expectations.

Views of Human Nature

After reaching this dead end, I began to think again about the majority's statement that "the use of corporal punishment in this country as a means of disciplining children dates back to the Colonial period."[14] I remembered the Puritan concept of the nature of man prevalent during this period and wondered whether the Puritan view of man as innately depraved might be part of the historical roots of the use of corporal punishment. I then obtained a number of books giving early descriptions of the Massachusetts Bay Colony in the seventeenth century and began examining the material for passages dealing specifically with the Puritan view of man as well as for evidence of various forms of physical punishment employed by parents and teachers to control children. I analyzed and summarized much of this material, which reflected Puritan beliefs about the nature of man, reverence for obedience to authority, and the necessary use of corporal punishment to control the profligate tendencies of children both at home and at school.

It was during my research of the early Puritan period in this country that I came across an article that described Quaker school life in Philadelphia before 1800. The article pointed out that the Quakers established a colony in that

region about the same time the Massachusetts Bay Colony was founded. The Quakers' attitudes toward children and the use of physical discipline were sharply different, however, from those of the Puritans: the former were based on the assumption that children could be governed by love rather than fear.

At this point I was again uncertain as to how to proceed further. I had accumulated a considerable amount of notes on early Colonial history involving the use of corporal punishment, but I didn't see this paper as being a historical piece, and, after all, a number of fine books have been written on the topic. I had to find some ideological or philosophical bridge from the Puritan period to contemporary times. While it was clear to me that the notion of innate depravity is no longer a predominant belief in this country and that the influence of the democratic, humanistic values espoused by the Quakers has led to the gradual reduction (and in many cases the elimination) of the use of corporal punishment in our public schools, the practice still persists in certain parts of this country. Why is this so? It occurred to me that there had been a transformation of the Puritan notion of man as innately depraved into a contemporary concept of man as innately aggressive. It was this latter notion, supported by much scientific and pseudo-scientific writing, that apparently many Americans believed to be true.

Once I saw the possibility of a relationship between innate depravity and innate aggression, the next step in the process was relatively easy. I discussed the concept of innate aggression as expressed in three popular books on the subject: one by Robert Ardrey, *The Territorial Imperative;* another by Desmond Morris, *The Naked Ape;* and the third by Konrad Lorenz, *On Aggression*. While not endorsing these theories and beliefs, I felt it important to describe them because I believe they were and still are held in the subconscious (if not the conscious) thought of many Americans. And furthermore, these beliefs appear to find cultural expression during periods of social change and unrest. I included in my paper a quote by M. F. Ashley Montagu that I thought expressed quite well why this view of man finds popular support in this country today:

> The layman is bewildered. Two World Wars, the breakdown in political, public, and private morality, the ever-increasing crime rates, the development of a climate and a culture of violence, together with the consciousness of an apocalyptic realization of irreversible disaster, are quandries enough to cause men to look desperately about them for some sort of an answer, for some explanation of the meaning, of the causes which seem to be leading man to destruction.[15]

Further insight came when it occurred to me that the Puritan belief that children were evil had reappeared in our modern society in the form of the devil-in-child or devil-as-child themes in a number of recent American films, such as "The Exorcist," "Rosemary's Baby," "The Omen," and "The Devil Within Her." I came across a review of "Rosemary's Baby" in which the reviewer, G. Forshey, explained the fascination for the film in a way that sounded remarkably similar to Montagu's explanation for the popularity of books on innate aggression:

> The events of our day, the seemingly uncontrollable forces existing in the world, have opened up the occult again. We are coming to believe in powers and principalities again and are trying to find the language to express that belief. Wars, the increasing number of violent crimes against persons, the devastating undermining of our political institutions, the energy and environmental crises, etc.—all these seem to be out of the hands of human beings. It seems as if the devil himself has control of the forces which shape us . . . ."[16]

I also came across a *Time* magazine cover story called "The Youth Crime Plague," which described in sometimes gruesome detail the nature and extent of youth crime in this country. The article expresses the insecurities adults have when confronted with the uncontrolled and purposeless violence and destruction by juvenile offenders:

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> How can such sadistic acts—expressions of what moral philosophers would call sheer evil—be explained satisfactorily by poverty and deprivation? What is it in our society that produces such mindless rage? . . . Or has the whole connection between crime and society been exaggerated? Some of the usual explanations seem pretty limp.[17]

Many people in our society perceive that social science explanations of youth crime and violence are inadequate to explain this behavior and, more importantly, that social science has no workable solution to youth crime. Lacking a rational explanation for youth crime, these people might well be expected to attribute such inexplicable violence to the supernatural, or at least mysterious, forces.

Roots of Parental Authority

It was at this point in my paper that it seemed right to introduce a purely philosophical perspective concerning the tensions and conflicts between parent and child, teacher and pupil. That perspective was provided by F.S.C. Northrop in a chapter entitled "Comparative Philosophy and Science in the Light of Comparative Law" in a book entitled *Philosophy and Culture East and West*, edited by C. Moore.[18] Northrop develops a theory of what he calls the "law of status," which is based on the biologically determined relationship between parent and child. Northrop's discussion of the law of status led me to see the close relationship that exists between corporal punishment and belief in the biologically determined position of power the parent maintains over the child. I wrote about this relationship as follows:

> Such absolute power as that of a parent over a child, based not on merit but on biology, has provoked various cultural anxieties, which find expression in our mythology and art. It can be argued that the absolute, biologically determined relationship of parent to child is both the source and the expression of such collective cultural anxieties as fear of repression and fear of rebellion. In

Western culture, these fears and anxieties are reciprocal—child fears parent (usually father) and parent fears child. In mythology, these fears are almost always couched in terms of violence—physical coercion and violent death. Greek mythology, the source of many archetypes fundamental to Western culture, is replete with patricide and infanticide. Cronus (one of the Titans and the father of Zeus) eats his children so that they will not supersede him; Zeus escapes this fate, in turn poisoning Cronus and taking his place. Oedipus kills his father and succeeds him as king.

Given that early Western mythology and literature portrayed parent-child relationships in terms of bloody conflict, it is hardly surprising that Freud drew on such myths to describe the anxieties plaguing modern man—anxieties centering around the parent-child relationship. And whether or not one endorses Freud's theories, their impact on the course of modern thought cannot be denied.

Western culture from its earliest Greek sources abounds with children who fear repression by parents and parents who fear rebellion by children. These cultural anxieties are even expressed in the language we use to describe our own American history. The colonies rebelled against "the mother country" and became "the fledgling republic" because of repression by England. Note that, as in Greek mythology, the repression and the rebellion were violent.

In reaction to the "violent 60s," many adults are now calling for a return to the "good ole days" when children respected their parents (and others in authority) and were obedient and well disciplined—in other words, a return to what Northrop calls the law of status. Corporal punishment, as the most obvious

> expression of the ascendancy of parent over child, teacher over student, is an important symbol of law-of-status authority and, therefore, is an important element of the desire for return to the "good ole days."
>
> Despite the progress and reform of childrearing practices during the last century, the basic relationship between parent and child remains the same, at least at a very primitive level of our collective unconscious (to borrow from Jung). Perhaps we are so loath to give up corporal punishment for children (though not for adults) partly because physical coercion is the most immediate and explicit expression of a very important authority relationship—parent and child. Control of children through corporal punishment symbolizes not only other more subtle forms of adult control of children, but also represents the absolute nature of the biologically determined relationship between parent and child—a vertical relationship in which one party (parent) rules autocratically and absolutely over the other (child).[19]

It would be a mistake to conclude that the Court through its decision sought to rigidly reinforce this age-old ascendancy of parent over child and teacher over student. I pointed out that our cultural heritage also reflects what Northrop calls "liberal contractual democracy," a concept that, as he states, "depends on consent rather than biology and breeding" for authority. I concluded my analysis by suggesting that the Court's decision actually reflects the tensions between these two opposing strains of American thought. If the "vitality of contemporary American society lies in the continual balancing of extremes of authoritarianism and humanism, control and freedom, hate and love . . . then the Court's decision, coming as it does after the youth-oriented, revolutionary spirit of the sixties, is but one manifestation of our societal balancing act."[20]

Conclusion

In summation, my study of the cultural values and beliefs behind the Supreme Court's decision in *Ingraham* required me to engage in a process through which I discovered interrelationships among pieces of material that previously existed in isolation from one another. I acquired and analyzed information from a variety of disciplines and sources, including history, biology and zoology, philosophy, psychology, mythology, and contemporary films and film criticism. The interrelationships I discovered among these previously isolated pieces of information were of two kinds. Some relationships developed out of the concepts and ideas that were drawn directly from the books, journal articles, and other materials I read. Another kind of relationships was the product of original insights gained from seeing how all the individual pieces of material fitted together, confirming the truism that the whole is greater than the sum of its parts. The discovery and use of both kinds of relationships are crucial to the advancement of conceptual frameworks that give shape and direction to a values study.

> [W]e must *assume* connections between events if the events of our experience are to have any meaning for us at all. The human mind is such as forces us to interpret relationships between the items of our observation. Hence the mind half observes and half creates its knowledge; it observes events and it creates connections between events. Human knowledge is possible only if the connections which the mind makes are the sorts of connections which really obtain in the world we live in.[21]

Anyone who attempts a values study of a high court decision must strive for an eclectic vision. The analyst's perspective must somehow transcend the boundaries of his or her discipline to avoid being captive to incomplete information or faulty assumptions. "The intellectual strength and quality of jurisprudential inquiry necessarily depends in large part on the insights, learning and wisdom, experiences and perspectives of the commentator."[22] It may well be that

only those with a strong liberal arts education, coupled with some talent and experience as writers, possess the necessary combination of learning and experience to do a values study of a high court decision.

Although one possessing such skills would have to become knowledgeable of the legal aspects of the case, he or she would be able to enter the study (as I did) with a freshness of outlook that contributes to the ability to think creatively. The goal of this creative exercise is to be able to achieve harmonization of thought and feeling, what William Butler Yeats called "blood, imagination and intellect running together."

While objectivity is also desirable in doing a values study, it is not fully possible nor even necessary in the sense of being value free. It is taken for granted that one will bring to the work a particular epistemology, admitting as evidence whatever corresponds with his or her world view and ethical predispositions. The analyst should try, however, to alert the reader by explicitly stating the presuppositions behind the analysis.

The process of discovering relationships among the various legal issues in a case and the cultural values and beliefs behind the majority opinion is inevitably gradual and fraught with wrong turns and blind alleys. Insights seem to be gained in direct proportion to one's increasing familiarity with the material. Much discovery, I found, takes place in the actual task of writing, which forces hard thinking and what Gerard Manley Hopkins called "The fine delight that fathers thought."

What begins as an effort to collect and digest all the information bearing on the subject becomes a task of weeding out unnecessary details. One must back away from the particulars to catch sight of the whole. How this is done does not reduce to a simple formula. It takes a mixture of good sense, intuition, inquisitiveness, and a willingness to spend hours and hours becoming thoroughly immersed, indeed possessed, by the method and the material.

But despite one's best efforts to show by explanation or juxtaposition the relationship between a high court decision and the historic and contemporary values in a society or culture, one never achieves a completely satisfying explana-

tion of the issues. There always remain some incongruity, some ambiguity that can be traced to a lack of fit among the pieces. But it is in the process and the outcome of these efforts to examine and explain the values and beliefs behind the laws in our society that one may begin to understand and appreciate the difficulty of achieving purely legal solutions to problems in education.

Footnotes

1. 430 U.S. 651 (1977).
2. P. Piele, "Neither Corporal Punishment Cruel nor Due Process Due: The United States Supreme Court's Decision in *Ingraham v. Wright*," *Journal of Law and Education*, 7, 1 (January 1978), pp. 1-19.
3. Flyer announcing "A Seminar on Problems of Law and Society," East-West Culture Learning Institute, p. 1.
4. R. Vuylsteke, ed., *Law and Society: Culture Learning through the Law* (1977).
5. J. Walsh, "How Laws Express Social Values," *East-West Center Magazine*, 7 (Winter-Spring 1978).
6. Ingraham v. Wright, 498 F.2d 248 (5th Cir. 1974).
7. Ingraham v. Wright, 525 F.2d 909 (5th Cir. 1976).
8. Ingraham v. Wright, 430 U.S. 651, 657 (1977).
9. Besides a separate brief for the respondents, James Ingraham, et al., and the petitioners, Willie J. Wright, et al., there were two *amicus curiae* briefs in support of the respondents, one by the National School Boards Association and the other by the United Teachers of Dade, Local 1974, AFT, AFL-CIO, and two in support of the petitioners, one by the National Education Association and the other by the American Psychological Association Task Force on the Rights of Children and Youth.
10. *U.S. Supreme Court Records and Briefs*, 1954 to date (349 U.S. to 417 U.S. arranged by citation; 1974 to date arranged by docket numbers with a printed alphabetical index).
11. Samuel Taylor Coleridge, "Essay IV" (2nd Section), in *The Friend* (1818).
12. T. S. Eliot, *Four Quartets*.
13. Piele, "Neither Corporal Punishment," p. 7-8.
14. Ingraham v. Wright, 430 U.S. 656 (1977).
15. A. Montagu, ed., *Man and Aggression* (1968), p. viii.
16. G. Forshey, "A Vision of Evil," *The Christian Century*, 91 (February 13, 1974), p. 183.
17. *Time*, July 11, 1977, at 25.
18. F. Northrop, "Comparative Philosophy and Science in the Light of Comparative Law," in *Philosophy and Culture East and West*, ed. C. Moore (1962). I learned later that Professor Moore was a long-time member of the Department of Phil-

osophy at the University of Hawaii and an internationally known cultural philosopher.

19. Piele, "Neither Corporal Punishment," pp. 17-18.
20. *Ibid.*, p. 20.
21. D. Bailey, ed., *Essays on Rhetoric* (1965), p. 146.
22. I. Walsh, "How Laws Express Social Values," *East-West Center Magazine*, 7 (Winter-Spring 1978).

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The Impact of Student Rights and Discipline Cases on Schools

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Introduction

This paper explores a very simple idea that is at the same time complex and profound, namely that, insofar as discipline in public schools is concerned, what the Supreme Court says is no longer very important. The argument I wish to explore is not that the opinions of the Court in discipline cases have never been important. To the contrary, the Court's role has been very important in the last decade. But its opinions derive their present importance not from what they said (or equally vital, what they did not say) but from their role in a chain of events that now bears little relationship to the Court. At this point in 1979, I would submit that any new alterations the Supreme Court chooses to make in its interpretation of discipline issues, including dilution of earlier standards set or implied, will be almost beside the point so far as the reality of schools is concerned.

Earlier discipline decisions (those of 1975 especially) were set in a context of broad Court intervention in social welfare issues, a pattern that began in the 1960s. These early decisions fed into a complex interwoven process of internal review, external monitoring, and demands for accountability for schools, a process in which groups widely divergent in interests and expectations have joined.[1] Parents interested in protecting their children's rights in schools, parents interested in more responsive and responsible administration, school boards anxious to avoid liability, teachers uncertain about preferred strategies for handling discipline, and teacher unions wanting to relieve their members from cafeteria duty have all "attached themselves" to the student rights cases of

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the early 1970s and used those cases to further define their responsibilities and roles. I have in mind most particularly the *Goss v. Lopez* and *Wood v. Strickland* cases.

My point is that what mattered to all the groups mentioned above was not the precise details of the Court opinion, but rather the spirit of review and questioning for schools, for individual teachers, and for school boards that was implied by those two cases (and others). There is in fact good reason not only to suspect a lack of acquaintance with case and ruling details, but to suspect that many in education gloss over the central issues as well.

Observers sensitive to the precise questions raised by the Supreme Court in education (particularly discipline) cases point out that more recent cases such as *Ingraham v. Wright* and *Carey v. Piphus* seem to return to schools some of the leeway or discretion limited in earlier decisions.[2] Yet, the practical effects of having this more complex picture sketched by the Supreme Court may be limited; the machinery for taking the more regulative decisions into account has been set in motion, and its formal structures and process will remain.

In the next section I will highlight some of the cases previously decided by the Supreme Court and some cases in the court system at present. Next I will discuss the informational channels by which teachers and administrators gain acquaintance with court decisions and issues. Finally, I will use empirical survey data to show how much law-related knowledge teachers have about discipline and how this knowledge relates to their experience and behavior.

Review of Court Cases

The two most influential U.S. Supreme Court decisions relating to school discipline in the first half of this decade are *Goss v. Lopez* and *Wood v. Strickland*. The questions raised by the Court in these two decisions warrant a brief review.

In *Goss v. Lopez* (1975), the Supreme Court ruled that in the case of a short suspension (one of ten days or less) a student must be given an oral or written notice of the charges, the basis for the charges, and, if the charges are denied, an opportunity to tell his or her side of the story.[3] In

emergency situations, in which a student poses a threat to persons, property, or the academic process, the student need not be provided the opportunity to tell his or her side of the story before suspension, but might be given the chance as soon as practically possible thereafter.

Justice Byron White, writing for the majority in a split decision, reasoned that students have a constitutionally protected property interest in a free public education. The basis of this protected interest is the requirement that all students attend school, which creates an entitlement to that education that is protected by the due process clause of the Fourteenth Amendment.

Justice White argued also that students have a liberty interest in their good name and reputation, which is protected by the Constitution. Because a record of misconduct (suspension) can damage a student's school reputation and interfere subsequently with opportunities for higher education and employment, Justice White indicated that a student must be given some due process safeguards before being deprived of a liberty interest for reasons of misconduct.

The Court majority, on the basis of the possible severity of damage to students as a result of short out-of-school suspensions, stipulated a minimal level of formal notification and hearing; the Court set up a simple procedure to be used without totally eliminating discretionary application of the procedures. Still, the effect of the decision was to remove some discretion from school officials in the application of suspensions, to stress somewhat more formalism in what remained a highly informal system. And clearly the Court was indicating that even short at-home suspensions could be a serious matter.

The case of *Wood v. Strickland* (also 1975) stemmed from a school board's expulsion of several students for violation of alcohol possession-and-use rules in the schools.[4] The students, alleging violations of both their procedural and substantive due process rights, sued the school board members. The issues raised in the eyes of the Court concerned tort immunity for school board members and the conditions under which board members were protected from liability for suit in the performance of their official duties. The Court majority, in a four-three decision, held a school board

member not to be immune to liability for damages (under the Civil Rights Act, § 1983) if he or she knew or reasonably should have known that the action taken would violate the constitutional rights of the student affected, or if the actions were taken with malicious intent to cause deprivation of constitutional rights or other injury.

Both of these cases raised the threshold of due process proceedings and the level of consequence for its neglect. In both cases there were strong cues that greater court expectations of school rationality, equity, and fairness would ensue.[5]

Not very long after the *Goss* and *Wood* decisions came two new Court decisions that suggested there was considerable discomfort in the Supreme Court about the role of the courts in schools. Some of the justices apparently felt no more comfortable than did many schools with the idea that the courts were taking an increasingly significant role in educational decisions. The minority group from *Goss* and *Strickland* became the majority group in the newer decisions, and the reservations expressed in the 1975 dissents became central to the majority opinion.

The *Ingraham v. Wright* decision (1977), a five-four decision, was written by Justice Lewis Powell.[6] The case was brought by James Ingraham, a junior high school student from Dade County, Florida, who received twenty licks with a paddle from school officials for being slow to respond to the instructions of a teacher. The paddling resulted in a hematoma requiring medical attention and kept Ingraham out of school for eleven days. Ingraham and another student took the school officials to court to recover individual damages and to obtain an injunction against school paddling.

To the Supreme Court, the students' lawyers argued that paddling constituted "cruel and unusual punishment," forbidden by the Eight Amendment to the Constitution, and that the students' due process rights prior to the paddling had been denied, in violation of the Fourteenth Amendment. The Court, ruling against the students, took the position that the risk of error of violating substantive rights of a school child was minimal, that the discretion of school authorities was appropriate, and that requiring safeguards would be unwarranted and undesirable intrusion. As has been suggest-

ed elsewhere, the Court in effect denied to children in schools the kinds of protection earlier extended to adult criminals who are imprisoned.[7]

On the issues of the amount of damage to students from school practices, the need for control of discretion in discipline, and the effect of requiring remedial systems, the *Ingraham* decision took positions unlike those of *Goss*. The clock seemed to be rolling back to an earlier time in which deference to school authorities in handling discipline was virtually unquestioned.

The *Carey v. Piphus* decision of 1978 concerned the damages due elementary and high school students who sued under 42 U.S.C. § 1983, alleging suspension from a public school without having been accorded procedural due process.[8] The court agreed that whether the students would have been suspended even had a hearing been held was an issue affecting the propriety of granting damages. Injury, the court said, could not be presumed to flow from every denial of due process:

> . . . although mental and emotional distress caused by the denials of procedural due process itself is compensable under § 1983, we hold that neither the likelihood of such injury nor the difficulty of proving it is so great as to justify compensatory damages without proof that such injury actually was caused.

Recognizing that the students had been deprived of their constitutional right to due process, the Court specified nominal damages not to exceed one dollar. The effect of this most recent decision is to reduce to a token the penalty for departure from due process protections, rendering the *Goss* protections rather thin.

At levels below the Supreme Court, there are straws in the wind that fit patterns both of more insistence on due process minimums and of more flexibility and discretion for schools in regard to what is required.

> The School Board of Clifton, N.J. was ordered to admit a pupil first suspended for drug use and then placed on home instruction because the board's drug policy

did not conform with the law so far as due process rights were concerned. The board was ordered to revise its policy.[9]

A student expelled for a single incident by the school board of Ocean, N.J. was ordered re-instated because of the drastic and desperate nature of the remedy, ill-suited to a single offense.[10]

A high school basketball team suspension for violating the prohibition on drinking was upheld by the court, which held that the students' due process rights had been protected by their being offered a hearing with counsel, witness, and so forth, even though no hearing was held.[11]

A school board policy of failing students absent an excessive number of times was accepted as valid since the policy dealt with academic requirements and standards, not discipline.[12]

Grades may not be used as punishment. When a pupil is absent for an excessive period of time, a double penalty may not be imposed by reducing the pupil's grade, and increasing the requirements for a passing grade. It is reasonable to expect the imposition of penalties for unjustifiable tardiness, improper absences from class, truancy. . . . Such penalties may, in effect, reduce a final grade in a course of study.[13]

Properly authenticated transcripts of attendance records are admissible evidence in a truancy proceeding. The roll-book need not be physically present, nor the teachers who made the entries.[14]

A student given three opportunities to appear before three different authorities to explain why he should not be expelled

> was given ample due process. Full scale hearings would be undue burden on school.[15]

It is perhaps noteworthy that in two of the three cases dealing with suitable punishment, the school authorities were upheld. Many observers would suggest that the *Horowitz* case is another indication of the very limited role the courts see for themselves in education.[16] The courts may be, as some commentators suggest, more "present" than ever before, but the standards of reasonableness firmly imposed by courts seem, so far, very modest in terms of their real influence on schools, running day after day.

Teacher Information Channels

How do Supreme Court opinions, much less opinions from lower levels of courts, become known to teachers? There are several subquestions embedded in this deceptively simple query: How do the media interpret the opinions? What media do teachers have routine access to? What do teachers understand from the information sources they use?

It is fairly clear that there is a market among teachers and administrators for the exchange of reliable information on how the judiciary's rulings affect their institutional and personal lives. In response to this market a diverse array of suppliers can be identified. Professional journals of the more popular strain have carried some fairly general articles, often with condensations of Supreme Court opinions. Scholarly journals in law and public policy have also carried a sizable number of articles.[17] Several semipopular books instruct teachers on protecting themselves and their schools from lawsuits, in regard to everything from discipline to playgrounds. And there are update services about discipline of varying levels of sophistication.[18] Many inservice training programs are offered at school, school district, and administrative levels by local and state authorities. Finally, in most states the chief education officer and staff have prepared written guidelines that apply Supreme Court and appeals court decisions to the state level, with appropriate statutory additions.

To take an example from this state, Wisconsin is

perhaps typical in that it has prepared and kept reasonably current a pamphlet entitled *Student Rights in Wisconsin Public Elementary and Secondary Schools*. The pamphlet carries three pages on suspensions, two on expulsions, and three on corporal punishment. The section on suspensions, following a statement of the Wisconsin statute and the meanings of the *Goss v. Lopez* case, concludes as follows:

> In summary, in Wisconsin a student may be suspended from school for not more than three school days for a violation of school rules or for conduct which endangers the health, safety or property of others. However, to validly suspend a student, the school authorities must follow the procedures outlined in the state law, and in addition, they must follow the procedures required by the Fourteenth Amendment as enunciated in the *Goss* case.
>
> Furthermore, the school rules should be clearly defined, and the students, teachers, and parents must be given notice regarding what is prohibited. A student cannot be expected to comply with rules he or she has had no opportunity to know about. Finally, the rules must have legitimate educational purposes. A school has no authority to promulgate a rule, such as requiring each student to carry in a stick of wood, which is not related to the educational process. Finally, a school cannot enforce rules which impermissibly infringe on a student's constitutional rights.[19]

This statement and the materials preceding it are written in clear language and, for the most part, would seem to remove most of the ambiguities that might surround suspensions. There is some lack of clarification about the effects suspensions may have on grading, a lack of clarification that is found in many states. Grading and suspension relationships remain a relatively open issue in the courts.

But this quite adequate and useful pamphlet is not widely known throughout the state. Teachers display marked interest in its contents, but for the most part have personal access to copies only if they make individual requests. Administrators, who receive copies, do not share them widely, except in the sense of "depositing" them for teaching staff. So far as law and discipline are concerned, the Wisconsin Department of Public Instruction is a modest resource for teachers.

Another possibility for acquainting teachers with law and discipline information is the school board. Some school systems have invested heavily in time and energy to produce systemwide policies on discipline. For obvious reasons, these activities have been more characteristic of school districts with very large student enrollments, often with minority morale and integration problems. Many school boards, especially more rural ones, are only now moving toward more systematic inventories of discipline practices. From those systematic inventories, or more often from general discussions, school boards are establishing written policies for schools to follow. But the process is often long and is incomplete in many areas. The school boards, some years after *Wood*, have defensive incentives for adopting reasonable and responsible policies in a variety of issue areas (including discipline). Yet traditions of community school system autonomy die hard, and school boards indicate reluctance to assert prerogatives in many areas of school substance and dynamics.

Sometimes school board discipline policies have taken the form of devising systemwide codes of student rights and responsibilities. On the other hand, many student codes originate at the school level and may even remain school-level codes. Whatever their origin, it was estimated in 1975 that about 76 percent of secondary school systems had written discipline codes, and about one-third of the secondary school systems had student rights codes.[20]

The question is the extent to which teachers can and do gain useful information about the law and discipline through student codes. Clearly, the answer very much depends on the characteristics of the code. Some codes in use have quite full

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explication of due process procedures, parameters for fitting punishment to offense, gradation of offenses, and relationship between seriousness or frequency of offense and nature of punishment. Both the York and the Pittsburgh, Pennsylvania, codes bear inspection in this regard. These are full, serious codes that intermingle the constraints of the law, the humanity of the schooling, and the minutia of daily events.[21] On a more abstract level, the National Education Association, the Center for Student Rights, Phi Delta Kappa, the National Juvenile Law Center, and the Center for Law and Education have all prepared model codes that, with appropriate state modifications, might serve to inform administrators, teachers, and parents. The National Juvenile Law Center code is confined to serious offenses, but the other model codes are more comprehensive in their scope. Some of these are long and complex, whereas others are briefer and like a constitution in appearance. Any of them would serve to inform about the constraints of the law on discipline.

These models, as we might all suspect, only modestly inform social reality. The Center for Public Representation, as part of its project for examining and analyzing the discipline processes in schools, with particular focus on discretion and exclusionary justice, collected and analyzed a large number of secondary school codes from across the United States.* Most codes are extremely sketchy as to incorporation of any specific statements about student rights or exclusionary justice considerations. It is rare that the procedures associated with suspension are spelled out, even more rare that the issues of suspension length, parental involvement, or impact on grades are addressed. Hearings prior to disciplinary transfers are rarely mentioned.

In terms of specifically defined student rights, a substantial percentage of codes include provisions about the privacy of student records. But overall, to assert that

*Approximately two hundred codes were obtained and analyzed, representing a small fraction of existing codes. Still there is no reason to think that the findings from this collection and analysis are not typical for all codes.

teachers or students or parents can gain, from codes, substantive information about limits or application of the law regarding school discipline is to engage in fantasy. One scholar has pointed out how it is possible for "new" codes to do little more than codify existing informal arrangements, which are unfair.[22]

There are at least two other problems with codes that need to be identified, though they cannot be treated fully here. Most codes provide no dispute-handling mechanisms, no forum for adjudication of the specifics of code governance. Thus, codes that may be presented in a miniconstitution guise lack in fact the judicial branch of government (among other lacks). Second, there is good reason to question what impact codes have on schools. Do they, or the bodies or procedures they create, feed information back to the school that permits any continuing review of policy? For that matter, have they *any* effect? Teachers and students in many schools have no firm ideas whether there are codes. Administrators usually know about the existence of codes. But it is a rare teacher or student who has much acquaintance with a code. Perhaps this is not inappropriate, given the earlier comments about the overall absence of meaningful materials in codes. Many codes are to be found only in the archives; perhaps they belong there.[23]

In the past decade, as part of the wave of enthusiasm for student codes, there have been proposals that states require codes for each school and that state departments of education have a strong hand in their preparation, perhaps mandating certain contents (such as hearings before suspensions, protections for expulsions, guidelines for corporal punishment, dispute handling mechanisms) as well as certain procedural aspects of code preparation, adoption, and revision. Were this more rigorous code system to be required, codes might become a meaningful tool for better acquainting both students and teachers with considerations of law and discipline.

Having identified two general avenues by which teachers gain information about the law and discipline (state departments of education and codes), let us turn to the question of what, in fact, teachers know about such matters.

Empirical Findings

In January 1977, 186 school teachers in junior and senior high schools in a middle-sized Wisconsin city were asked to complete fairly lengthy questionnaires as part of the school discipline study mentioned previously.[24] Included in the questionnaire was a true-false battery of questions about student rights and the law on discipline.

A majority of teachers gave the correct response on six of the eleven items (see table 1). Among the items, the highest percentages of right answers were given about (1) requirements for hearings before disciplinary transfers and (2) the liability of individual administrators and school board members to lawsuit if a student's rights were violated. Just over half of the teachers knew that a student had the right to a hearing before a short suspension (precisely the issue raised in the *Goss* case).

The level of information is not strikingly high. The modal number of correct responses is five, with both mean and median slightly lower. Eighty percent of teachers gave three to six correct responses (see table 2).

Table 1
Teachers' Responses to Statements about the Law and Discipline

	True	False	Not Sure	Total
1. If a student's rights are violated, individual administrators and school board members can be sued.	71.4*	7.7	20.9	100%
2. A student can be suspended or expelled for skipping school.	72.8	17.2*	10.0	100%
3. A student has the right to a hearing before being transferred to another school for disciplinary purposes.	76.8*	8.9	14.3	100%
4. Teachers can lower students' grades when they skip school.	32.2	59.6*	8.2	100%
5. If a student is suspended, the principal can require the student's parent(s) to come to the school before the student is readmitted.	91.9	1.6*	6.5	100%

6. A student has the right to a hearing before a short suspension.	54.6*	25.4	20.0	100%
7. Outsiders need your permission or that of your parents before they can see your school records.	64.5*	11.8	23.9	100%
8. Teachers hitting students is illegal in Wisconsin.	59.1	28.5*	12.4	100%
9. Under some circumstances, even a teacher can expel a student from school.	11.8	65.6*	22.6	100%
10. A student has a right to a lawyer if he or she is about to be suspended.	52.4	13.5*	34.1	100%
11. All schools in Wisconsin must have a Student Bill of Rights.	32.8	19.4*	47.8	100%

* Correct response N = 174

Several findings revealed in table 1 are worth noting. Teachers tend to think students have more rights than they do. For example, they think students have a right to a lawyer before suspension and that it is illegal to hit a student. Yet the bias in answers is not consistently toward the exaggeration of student rights; teachers are fairly united in the error of thinking a suspended student cannot be readmitted unless the parents come to school.

Table 2
Correct Responses to Statements on Law and Discipline

Number of Correct Responses	Percentage
1-2	5.7
3	17.2
4	21.8
5	25.9
6	15.5
7	11.5
8 or more	2.3
	100%

N = 174

The extent of knowledge varied scarcely at all among teachers by sex, possession of an advanced degree, age, or years of teaching experience. There was, however, some tendency for those from higher socioeconomic backgrounds to know more about law and discipline, and for union members to know less. This latter finding is somewhat surprising because unions in many systems have been intimately involved with discipline policies, especially as they involve using teaching personnel for hall and cafeteria duty. That these background variables seem to be of modest utility in understanding knowledge about the law and discipline is perhaps not surprising. Their lack of influence on teachers' knowledge may be another confirmation of the homogenizing aspect of recruitment and socialization into teaching discussed so well by Dan Lortie.[23]

How do teachers vary in their knowledge of law and discipline according to their own experience with discipline? Are teachers who have been victims of disciplinary infractions or who have been involved with levying penalties more knowledgeable than those who have not had such experiences?

Analysis of data about involvement with several types of punishments shows that:

1. Teachers who have participated in expulsions, exemptions, internal suspensions, and home suspensions do not know significantly more about law and discipline than those who have not been involved with these sanctions, but
2. Teachers who have more knowledge are slightly more likely to be involved with punishments.

It is interesting to speculate whether this latter observation means that those who have a better grasp of the ways in which law affects discipline realize how lightly the hand of outside control rests and feel more free to sanction. Those who know less may exaggerate the force of law and thus may be less inclined to become involved with "visible" penalties.

There is no relationship between teachers' knowledge of law and discipline and their having been victimized by pranks or practical jokes, vandalism to their property, verbal abuse, physical attack, or other criminal action (theft, for example). Teachers who have good funds of information about limits and requirements on discipline are no more

likely to escape awkward experiences as victims. Conversely, being victimized more often is not associated with greater knowledge.

Thus, neither background characteristics nor personal involvement with discipline does much to illuminate channels by which teachers differentially learn about the law and discipline. It may be that the "clumping together" of teachers toward the lower end of the knowledge scale renders conceptually and methodologically useless inquiry into how teachers obtain correct information. None of the characteristics discussed above is more than modestly helpful in understanding how teachers get information about law and discipline or how it informs their behavior.

What pattern of relationship is there between teachers' knowledge of law and discipline and their attitude toward the role of courts in school discipline? Teachers' attitudes toward court decisions on school discipline are the subject of table 3. Overall, teachers most commonly respond that court decisions do hamper teachers and administrators in their application of discipline. Only very modest percentages respond that court decisions have no effect, though over one-

Table 3
Teachers' Attitudes toward Court Decisions on School Discipline

What effect have court decisions on school discipline had on your school (check all that apply)?	Percentage Checking Item
Student has been protected from official's arbitrary decision.	35.1
Teachers and administrators have been hampered in their application of discipline.	58.4
Administrators now have a formal process for suspending students that enables them to handle discipline problems better.	42.2
No effect on administrators in suspension cases.	3.2
Students are still subject to discretionary and even somewhat discriminatory application of sanctions.	9.2
No effect on teacher in suspension cases.	3.8
Not sure.	27.0

N = 186

quarter are not sure. A fairly large number of teachers see positive effects flowing from court decisions (either the first or third item would be checked by such persons).

These different responses are not systematically related to differences in teachers' information or knowledge about the law and discipline. Teachers with higher scores on the true/false battery are no more positive in their assessments of court effects than those with poor information. Greater knowledge of specifics does little to lead to greater receptivity. Although this analysis involves only 186 teachers in one school system, it raises some familiar, disturbing issues.

Given the quite modest profile court regulation of discipline has, teachers in their largely negative reaction seem likely to be responding to something else—in fact, to a pair of closely related things. First, teachers could not be unaware that for some types of problems the courts' role has been a major one in causing schools to change; the desegregation cases and orders are a prime example, even though they have had no direct effect on the teachers in our sample. Not knowing the specifics of court rulings, teachers are prepared to assume the worst.

Second, these teachers are responding as conservatively recruited and socialized professionals and semiprofessionals usually do when the activities of "outsiders" threaten to reduce system autonomy. They respond with apprehension when the hydra of intervention is raised. The literature on school response to community efforts for greater accountability is fairly consistent in picturing resistance and hostility as the dominant reaction. These teachers are manifesting those same alarms, and the extent of their factual knowledge does nothing to dissipate their concerns.[26]

We have, then, a series of findings as follows:

1. Teachers have rather little factual information about the law and school discipline.

2. Their knowledge is essentially unrelated to background characteristics, to their involvement with levying punishment, and to experiences as victims.

3. Their dominant reaction to court intervention is apprehension, quite unrelated to their knowledge about the law and discipline.

Conclusion

These findings lead back to the point of origin for this discussion: that it does not matter what the courts say now, as long as future decisions are within a reasonable range of expectations. Teachers by and large have responded with apprehension little related to real information. The gauntlet has been thrown in their eyes, and neither *Ingraham* nor *Carey v. Piphus* will bring it back. Teachers are not, of course, the only response group to note. To a modest extent, the social reform types of queries and activities so widespread in the United States in the 1960s, which now seem so dormant in many issue areas, are alive in education. Though the Brownsville headlines are old, the kinds of probing and challenge they represent are not dead. Perhaps the 1975 court decisions might be more usefully seen as part of a stream of events, not the source. It is to this stream of events that teachers are reacting.

It is not surprising, then, that teachers seem so unresponsive to the finer points of law and school discipline. The impact of court decisions is correctly perceived by them as part of a broad process of questioning and challenge. Issues surrounding the law and discipline are, after all, only a small part of the present tension in our society about the aims and methods of schools. I am suggesting that teachers react as part of a general defensive posture to those issues. There is a sort of domino theory here. What the courts say next about discipline will probably matter very little, especially when we recognize how poor communication is, how imperfect information is, and how little information informs behavior.

How useful is the broadening of school discipline issues into general challenges to school authority and personnel? Are those who are responsible for the administration of school rules any better able to deal with discipline by viewing it in a wider context? In most sectors of society, there is marked utility in being able to identify and solve problems at a disaggregated level, at the same time that links to general issues and trends are realized. To the extent that teachers and administrators can objectively assess school discipline problems, dissociated from the tensions they feel concerning larger issues, there will be more implementation of standards

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for administrative and procedural justice.

But is this progress toward justice likely to happen? There are powerful incentives within the profession for avoiding bureaucratic confrontation and workload. Without vigorous push by those defined as outside the school system, teachers and administrators will most likely marginally increase their store of factual information with motives of self-defense uppermost in mind. They will execute administrative and procedural justice with the goal of defending institutions and not in terms of the merits of the issues. Only occasionally will the true basis on which administrative justice standards rest be remembered.

Footnotes

1. See, for example, the National Commission on the Reform of Secondary Education, "Recommendations for Improving Secondary Education" (and other essays), in *Pygmalion or Frankenstein*, eds. John C. Carr, Jean Dresden Grambs, and E. G. Campbell (Reading, Massachusetts: Addison-Wesley, 1977).
2. William R. Darms, "The Supreme Court and Corporal Punishment: A New Wave of Abuse?" (unpublished paper, 1977); Robert McKay, *School Discipline and the Courts* (Aspen Institute for Humanistic Studies Program on Justice, Society and the Individual, March 1978).
3. 419 U.S. 565 (1975).
4. 420 U.S. 308 (1975).
5. William R. Hazard, "The Law and Schooling," in *Conflicts and Tensions in the Public Schools*, ed. Eleanor P. Wold (Beverly Hills, California: Sage Publications, 1977), pp. 45-68.
6. 430 U.S. 651 (1977).
7. Joel Grossman, "The Courts as Intervenors," in *School Discipline: Roots and Remedies* (Ellen Jane Hollingsworth ed.), special issue of *Education and Urban Society* (forthcoming, 1979).
8. 98 S. Ct. 1042 (1978).
9. "E.F.," parent and guardian *ad litem* of "J.F." v. Board of Educ. of the City of Clifton, N.J. Comm'r of Educ. Dec. (1978).
10. "D.P.," a minor by his mother v. Board of Educ. of the Twp. of Ocean, N.J. Comm'r of Educ. Dec. (1978).
11. Braesch v. DePasquale, 265 N.W.2d 842 (Neb. 1978).
12. Haight v. Board of Educ. of Midland Park, D.C. New Jersey, No. 78-1051 (1978).
13. Weatherell v. Board of Educ. of the Twp. of Burlington, N.J. Comm'r of Educ. Dec. (1978).
14. *In re* Kelly, 405 N.Y.S.2d 207 (Fam. Ct. 1978).
15. Whiteside v. Kay, 446 F. Supp. 716 (W.D. La. 1978).
16. Board of Curators, Univ. of Missouri v. Horowitz, 435 U.S. 78 (1978).
17. Brannon Heath, "Constitutional Law: *Goss v. Lopez*: Much Ado about Nothing or The Tempest," *Loyola University Law Journal*, 7 (1976), pp. 193-216; Note, "Student Rights under

the Due Process Clause . . . Suspensions from Public Schools," *Akron Law Review* 8 (1975), p. 570; Paul Weckstein, "The Supreme Court and the Daily Life of Schools: Implications of *Goss v. Lopez*," *Inequality in Education*, 20 (1975), pp. 47-57; Peter Roos, "*Goss* and *Wood*: Due Process and Student Discipline," *Inequality in Education*, 20 (1975), pp. 42-46; Burton B. Goldstein, Jr., "Due Process in the Public Schools—An Analysis of the Procedural Requirements and a Proposal for Implementing Them," *North Carolina Law Review*, 54 (1976), p. 641; Robert E. Phay, "1975 Student Discipline Decisions by the United States Supreme Court," in *New Directions in School Law* (Topeka, Kansas: National Organization on Legal Problems in Education, 1976); J. Harvie Wilkinson III, "*Goss v. Lopez*: The Supreme Court as School Superintendent," in *1975 Supreme Court Review*, ed. Philip B. Kurland (Chicago: University of Chicago Press, 1976), pp. 25-75; Mark G. Yudof, "Suspension and Expulsion of Black Students from the Public Schools: Academic Capital Punishment and the Constitution," in *The Courts, Social Science, and School Desegregation*, eds. Betsy Levin and Willis D. Hawley (New Brunswick, New Jersey: Transaction Books, 1977), pp. 374-411; Richard L. Mandel, "Student Rights, Legal Principles, and Educational Policy," *intellect*, 103 (1975), pp. 236-39; David L. Kirp, "Proceduralism and Bureaucracy: Due Process in the School Setting," *Stanford Law Review*, 28 (1976), pp. 841-76; Jane A. Marquardt and Bruce M. Plenk, "School Suspensions and the Right of Due Process: The Effects of *Goss* and *Wood* in Utah Schools," *Journal of Contemporary Law*, 3 (1976), pp. 87-101; George Washington University, *Options in Education Program No. 85: The Courts and the Public Schools* (Washington, D.C.: Institute for Educational Leadership, 1977).

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18. M. Chester Nolte, "The Legal Heat on Teachers—How to

Avoid It," *Learning*, (1978), pp. 86-88, 93; Croft-NEI, *School Administrator's Discipline and Control Update* (Waterford, Connecticut). See also the 1978 issues of *Creative Discipline*.

19. Wisconsin Department of Public Instruction, *Student Rights in Wisconsin Public Elementary and Secondary Schools* (Madison, Wisconsin: 1978).
20. Educational Research Service, *Codes of Student Discipline and Student Rights* (Arlington, Virginia: 1975).
21. These codes are included in the packet of Codes of Students' Rights and Responsibilities prepared by the Center for Law and Education, Harvard University, 1977.
22. Mark A. Chesler, *Maintaining Order and Administrative Discretion: The Detroit Uniform Code of Student Conduct* (Ann Arbor, Michigan: Community Resources, Ltd., 1976).
23. Ellen Jane Hollingsworth, "Exploring Remedies from Within," in *School Discipline: Roots and Remedies* (Ellen Jane Hollingsworth ed.), Special issue of *Education and Urban Society* (forthcoming, 1979).
24. This study, Ellen Jane Hollingsworth and Henry S. Lufler with the corroboration of William H. Clune, *Crisis in Mid-America: An Empirical Study*, is forthcoming. The study was funded by the Law Enforcement Assistance Administration and the Wisconsin Council on Criminal Justice.
25. Dan Lortie in *Schoolteacher* (Chicago: University of Chicago Press, 1975) has brilliantly discussed the conservatizing aspects of recruitment and socialization of teachers.
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Serrano and *Robinson:* Studies in the Implementation of Fiscal Equity and Effective Education in State Public Law Litigation

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Introduction: A General Paradigm of Implementation

Serrano v. Priest[1] and *Robinson v. Cahill*[2] are decisions of the Supreme Courts of California and New Jersey, respectively, which declared unconstitutional the entire system of financing public education in each state. Both cases are based on state constitutional grounds,[3] particularly those state constitutional clauses seeming to command special treatment of education.*

* State constitutional provisions provide a wealth of grounds to support school finance reform efforts. The constitutions of all but four states contain explicit provisions that guarantee equal protection of the laws. Only ten state constitutions fail to explicitly provide for due process guarantees or their substantial equivalent. Additionally, six state courts have interpreted general constitutional language to provide for due process.

Nor is there a paucity of state constitutional provisions establishing substantive education entitlements. Twenty-nine state constitutions guarantee "thorough," "efficient," "uniform," or "general" state-supported educational opportunities for all children. Four state constitutions contain language that could be interpreted as a guarantee of educational opportunity. Finally, only eight states fail to provide for "tax uniformity," another possible basis for school finance reform litigation. *See generally* L.

The *state* constitutional bases for these decisions mark a shift in the orientation of school finance reformers. Initially, *federal* equal protection theories had been the principal basis of school finance reform suits. Both the California Supreme Court's original decision (on review of demurrer) in *Serrano (I)* and the New Jersey Superior Court's decision on the merits in *Robinson* had relied heavily on federal equal protection theory.[4] Soon after these decisions, however, the United States Supreme Court effectively closed the federal courts to school finance reform efforts. The Court's five-to-four decision in *Rodriguez v. San Antonio Independent School District*[5] held that even the gross expenditure disparities produced by the Texas school financing scheme did not offend the equal protection provision of the Fourteenth Amendment to the United States Constitution. The Court reasoned that the scheme did not infringe on any fundamental interest under the United States Constitution or unconstitutionally disadvantage any definable suspect class.

Since both *Serrano (I)* and the *Robinson* trial court decision had found education to be a fundamental interest and poor children residing in low-wealth school districts to be a suspect class, the courts were forced to rely on *state* constitutional provisions. Thus, *Rodriguez* motivated the New Jersey Supreme Court to abandon the equal protection theory altogether and to rely on the state education clause; it forced California courts to "find" "an adequate and independent" state equal protection guarantee to support *Serrano (II)*.

Perle, *State Constitutional Provisions and Selected Legal Materials Relating to School Finance* (1973), pp. 4, 5, 9, 10, *passim*; W. Newhaus, *Constitutional Uniformity and Equity in State Taxation* (1959), pp. 234-48.

In *Robinson*, the New Jersey Supreme Court relied exclusively on the state constitution's substantive guarantee that "[t]he Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all children. . . ." *Robinson (I)*, 303 A.2d 290-97, *quoting*, New Jersey Constitution art. VIII, § 4, ¶ 1. In *Serrano*, the California Constitution's substantive educational entitlement served as a basis for the court's finding that education is a fundamental interest. *Serrano (I)*, 487 P.2d 1258, *quoting*, California Constitution art. IX, § 1.

The constitutional task of the *Robinson* and *Serrano* courts did not end with the formulation of a theory of recovery or the rendering of a decision. While attempting to leave as much of the job of reconstruction as possible to the state legislatures, these negative judgments still required continued judicial guidance on the criteria (or standards) of a constitutional system. Playing the managing role in statewide education reform automatically thrust each court into the paradigmatic role of what Professor Chayes (1976) has termed *public law litigation*. Public law litigation has four distinguishing characteristics:

1. Several parties with diverse interests participate in the litigation.
2. An orientation toward future social change rather than compensation for a past event characterizes the goal of the litigation.
3. The question of remedy raises wholly separate considerations from that of the violation.
4. Judges have continuing jurisdiction over complex organizations and assume a public, almost political identity.*

Diverse Party Configuration

In discussing the demise of the bipolar party configuration that characterized the traditional model of adjudication, Chayes notes that "the pressure to expand the circle of potential [parties] has become inexorable."[7] Reflecting the social policy-making role of courts in public law litigation, wide-ranging interests are represented before the court. *Robinson* exemplifies this departure from review of bilateral transactions between private parties. During the course of the *Robinson* litigation, over thirty parties in interest or amici came before the court. These parties represented interests ranging from New Jersey governmental officials to taxpayer interest groups.* This general pattern

* Specifically, the following parties or their representatives appeared before the court: the governor, the state treasurer, the commissioner of education, the Board of Education, the president of the State Senate (and the Senate), individual members of the Senate, the speaker of the State General Assembly (and the General Assembly), individual members of the General Assembly,

was paralleled in *Serrano* where approximately twenty-two attorneys appeared before the court.[8]

Change Orientation

A judge in public law litigation is also involved, almost by definition, in "implementation." The term *implementation* is greatly to be preferred over *impact*. Implementation conveys both the active managerial role of the social change agent[9] and the meanderings, reversals, and reciprocities of causation and change in the social reform context. In contrast, impact is a term that perhaps more accurately describes the effects and expectations of traditional private law litigation—one way causality.[9]

Private law litigation's effects were assumed to terminate within a limited period of time. Therefore, a decision's impact could be readily measured by Campbell and Stanley's

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and the New Jersey School Boards Association. Professional educators were actively represented by the New Jersey Education Association. The American Civil Liberties Union of New Jersey and the National Association for the Advancement of Colored People jointly represented the urban poor, blacks, and the "childrens' lobby." Civil rights, school finance reform, and urban interests were also represented by the New Jersey Education Reform Project of the Greater Newark Urban Coalition assisted by the Lawyers' Committee for Civil Rights under Law. Finally, both high- and low-wealth cities and school districts argued their interests before the court. One would be hard pressed to identify an interested party omitted from this list.

[9] While this commentary focuses on judges as social change agents, this role may also be assumed by legislators or administrators. As change agents, legislators and administrators can exercise functions substantially equivalent to judges in a public law litigation context: that is, initial policy formulation; policy implementation planning; policy implementation monitoring; dispute resolution or followup policy modification; resource mustering; and enforcement. *See generally* Bardach, *The Implementation Game*, (1977) (legislator as change agent); Ohlin, Coates, and Miller, "Radical Correctional Reform: A Case Study of the Massachusetts Youth Correctional System," *Harvard Educational Review*, 44, 1 (1974), p. 76; Bakal, "Closing Massachusetts' Institutions: A Case Study," in *Closing Correctional Institutions*, ed. Y. Bakal (1973) (administrator as change agent).

quasi-experimental design.[10] In implementation, the "treatment" (the terminology of experimental design) constantly changes, reflecting conflicts, negotiations, and compromises in the effort to change the behavior of complex, powerful, and contentious social organizations. The treatment, moreover, is adjusted according to its effects. Although simple measurement of dependent variables at time 1 and time 2 may be useful, genuine understanding of the process demands an understanding of the continuous process of those adjustments in the treatment.

Ongoing Jurisdiction over Complex Remedy

If this discussion suggests complete lack of theory and need for unstructured anecdotal method where each implementation process is its own "story," the point was overdrawn. Powerful underlying generalities do exist in the implementation process. Forms of social change and characteristic constraints on change are recognizable, even if results are not always very predictable. The implementation process can be seen as involving a series of clustered dilemmas, or trade-offs. Moreover, if the process is at one place on the continuum in relation to one dilemma, it is likely to be at a similar location in relation to the others. Five major categories of dilemmas corresponding with aspects of the implementation process are listed in table 1.

Table 1
Implementation Dilemmas

Aspect of Implementation	Implementation Continuum	
1. Goal	Outcome	Output
2. Standards	Vague	Clear
3. Typical Majoritarian Response	Output Substitution	Formalization or Compromise
4. Enforceability Problem	Response to Failure	Conflict, Intrusion or Monitoring, Supervising
5. Political Arena	Both Legislatures and Bureaucracies Oppose	Both Legislatures and Bureaucracies Favor

These various trade-offs are customarily viewed as dilemmas from the point of view of enforcement; they are

choices for the one trying to implement a new policy. While these trade-offs do present problems of enforcement or remedy, this conceptualization can be deceptive. The critical fact that implementation is significantly influenced by the process and nature of the policy formation process is unarticulated in the idea of an "enforceability problem." That is, implementation of a policy directive does not rise to the level of an "enforcement problem" unless it involves the effectuation of *counter majoritarian values*. There are no (or different) dilemmas to face if the object of a law is to benefit a well-represented majority (for example, veterans' benefits, one-acre zoning); but if a legislative or administrative majority strongly disfavors a change, the implementation process becomes a universe of powerful constraints. Hence, the study of implementation is a product of the modern age of minority rights, usually enforced by the judiciary.[11]

The first choice concerns the nature of the **goal** to be chosen and how goal attainment is to be evaluated. Specifically, the goal dilemma involves a continuum ranging from output to outcome.* Outputs are things done by the state administration: the delivery of more money, personnel, services, and so forth. Outcomes are results for the clients of the administration: higher skill levels, better health, more satisfaction, and the like.

This distinction between outputs and outcomes is fundamental and ubiquitous in school finance litigation because the stimulus for litigation usually is maldistribution of

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* The stage terminology used in implementation research differs from that commonly used in the education production function research. Under the implementation terminology, an *input* is an initial impetus to policy formation (lobbying, litigation, etc.). The *policy* formation *process* is the political activity that results in a policy declaration. An *outcome* is the policy declaration (e.g., statute, court decree, regulation) or other implementation requisite (revenue, personnel, etc.). The *implementation process* is the activity necessary to convert an output into an outcome. An *outcome* is the result of the implementation process. The scope and magnitude of an outcome can vary. Mastery of the alphabet is an example of a primary outcome. Functional literacy is an example of a secondary outcome. Effective citizenship or participation in the labor market is an example of a tertiary outcome.

resources, but the purpose of redistribution is to produce better education of children. The complexities presented by the goal dilemma are aptly illustrated by the U.S. Supreme Court's consideration of the issue in *Rodriguez*. Given the nascent state of the art on the relationship between expenditure levels and resulting educational quality (the so-called cost/quality debate), the Court's uncertainty arising from the indeterminacy of the issue permitted repeated expressions of hostility to redistribution of educational revenues.[12] Introduction of an outcome-oriented goal may have cost the plaintiffs a favorable decision. Conversely, *Serrano* held steadfastly to a definition of equity based on resources, which probably explains why the California Supreme Court was willing to find a violation and was also able to bring the legislature successively closer to compliance (ironically, a process interrupted and probably perfected by the exogenous thunderbolt of Proposition 13).[13]

Robinson was also affected dramatically by the goal dilemma. Having focused consideration of the alleged violation on equality of resources, the New Jersey Supreme Court turned decisively to a remedy directed at ensuring that all children were in fact educated.*

Goal clarity is correlative with the nature of the goal, and therefore, manageability, of the **standards** (criteria) of compliance. A basic canon of implementation and equity jurisprudence is that standards must be clear in order to be enforceable.[14] Typically, output standards can be made clear, explicit, and quantifiable—so many dollars, so many health care personnel, so many inmates per shower, and so forth. Outcome standards are intrinsically vague. For example, the standard "thorough and efficient education" can mean "an education that works." This, incidentally, was the construction the New Jersey Supreme Court gave to the standard. Albeit desirable, the requisites of an effective education are not readily ascertainable. They are even more difficult to measure. The court, in its wisdom, could offer little guidance on how to implement its decision.

A wholly or partially resistant **majoritarian process**

* For support of these and other assertions about the litigation, see the discussion of each that follows this general discussion.

responds differently to clear output standards than to vague outcome standards. Compromise is one response to clear standards, as was the case with the California and New Jersey legislatures' responses to the command for more fiscal equity. Another response is goal formalization, or goal displacement,[15] which is the reciprocal of compromise in the sense that there is full, nominal compliance coupled with underlying substantive avoidance. Numerical performance standards lend themselves to this response. For example, if an unemployment agency is rewarded for the number employed, it may place those who are easiest to employ rather than work on the tough cases, as it is supposed to do.[16] If schools are rewarded for students who score above a minimum on a test, they may seek to lower the minimum until all students can pass, teach for the test, or divert essential resources from students who can pass the test without help. New Jersey's program of statewide minimum pupil proficiency standards (enacted to comply with *Robinson*) certainly lends itself to goal displacement, but, apart from the New Jersey Education Association arguing the dangers of such a development,[17] proof of goal displacement does not appear to have surfaced.

The typical response to vague outcome goals is the substitution of output or process goals. Even if, perhaps *especially* if, we knew exactly what to do to produce a given effect for clients, the response probably would have to be cast in output terms. It may be known, for example, that prisoners require a minimum number of square feet of living space to have a sense of basic tranquility and privacy. When what to do is not known, or is known by those lacking the power to convince enough others of the efficacy of the remedy,* process goals become tentative and experimental.

* Given the uncertainty over what constitutes an optimal education and over the way to effectuate such an education, some commentators argue that parents or the school community should determine critical education policies. *See, e.g.*, R. Campbell, *The Chasm* (1974) (advocating community control over the education of minority children); J. Coons and S. Sugarman, *Education by Choice* (1978) (advocating parental control over the education of all children). The argument is not simply one of default but rather that community or parental control will make education better.

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New Jersey's plethora of compensatory and remedial programs seem to be of this kind, as are the pupil proficiency programs that followed in the wake of (though were not compelled by) *Serrano*,[18] as are all but the most focused and tailored of special education programs.[19]

There is, thus, a natural evolution of implementation or **enforceability problems.** Vague outcome standards raise the problem of what to do when failure occurs. If process goals have already been substituted for the outcome goals, new and still experimental process goals may be sought (for example, more money for remedial education, fewer mental patients per therapist). Substituted process goals probably encounter more severe problems of output enforcement than process goals conceived as good in themselves (for example, fiscal equity); but all such goals raise essentially the same problems. If the process is widely dispersed and closely held, typically the case with large government bureaucracies, the problem is how to monitor and supervise. Difficulties of Congress and the Department of Health, Education, and Welfare with Title I come to mind in this regard.[20] If the process is visible, as in the case of the fiscal impact of well-studied education finance bills in California and New Jersey, the problems are those of power confrontations at the intergovernmental level—how much conflict with and intrusion into the affairs of another branch of government can be managed and tolerated.

One recurring problem with intergovernmental conflict, especially if protracted, is that, in the long run, majoritarian forces operate on all branches of government (for example, in the selection of judges or in their fatigue and increasing sensitivity to public criticism). The present commissioner of public education in New Jersey, for example, who might be expected to capitalize on the *Robinson* mandates for higher quality education, is apparently restrained by the public official who appoints him, the governor, who is strongly influenced by considerations of fiscal restraint.

The first four dilemmas of implementation are, thus, not only illustrations of trade-off constraints but predictors of social change as well. The left-hand side of the dilemmas (outcome goals, vague standards, output substitution, response to failure) tend to develop into the right-hand group,

if the pressure for change is sustained. This is because, if anything is to happen, someone eventually has to tell the government specifically what to *do*.

Another dilemma of implementation concerns the **political arena.** Implementation in this paper includes implementation by both legislatures and education bureaucracies (of court decrees in *Serrano* and *Robinson*). Both legislature and bureaucracy face the same set of implementation dilemmas; but I am persuaded by Eugene Bardach's basic distinction between the politics of these two forums.[21] Legislative politics tends to be coalitional, the politics of interest groups, so that the characteristic difficulty of enforcing a counter-majoritarian value is compromise. The legislature is well designed faithfully to reflect the balance of forces in the polity and, when asked to enforce a counter-majoritarian goal, tends to approach the goal by gradually less majoritarian compromises. How much of the counter-majoritarian goal is ever achieved depends on the balance of power between the implementer (here, judge) and the legislature, and on the implementer's resolve and tenaciousness.

Bureaucratic majoritarian politics is defensive rather than coalitional. A new policy mandate is only one of many concerns to a complex organization, and the prevailing attitude toward the mandate is risk aversion. Commitment to the new mandate may threaten other policies or the position of the public official. For this reason, the characteristic difficulty of enforcement is determining and increasing the level of activity devoted to new as opposed to existing policies. Complex organizations have a plethora of ways, both budgetary and managerial, of "doing the same old thing under a new label," so that goal displacement and formalization are frequent responses as well as various forms of resistance and delay.*

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* An exception to the general "inertia" of complex organizations can be observed in "ideologically committed" organizations, organizations with high levels of esprit de corps. *See generally* H. Rodgers and R. Bullock. *Coercion to Compliance* (1978) on the ideology of the Office of Civil Rights in HEW and the Civil Rights Division in the Justice Department and their effect on securing school desegregation in the South.

Bureaucratic politics is nevertheless majoritarian in the sense that powerful interest groups can influence government organizations in various ways. The nonuse of organizational energy is often a response to political control or extrapolitical influence. Efforts by the New Jersey Education Association (NJEA) to influence *Robinson* implementation by the state Department of Education are probably a good example.[22] As the primary spokesman for classroom teachers in New Jersey, the NJEA has been an active lobbyist before the court (as an amicus in *Robinson*), the legislature, and the Department of Education. The NJEA has also been extremely active in disseminating its views directly to the public and its own members. As such, the NJEA was the pivotal force in formulating the substantive remedial response to the *Robinson (I)* decree. At NJEA's insistence, less ambitious "process standards" were adopted by the New Jersey State Board of Education.

California's Gradual Progress toward Fiscal Equity

Public law litigation typically falls into a pattern of a series of judicial decrees followed by government responses; *Serrano* was no exception. Three successive school finance provisions were involved:

1. the finance provisions in existence in 1971 initially disfavored by the California Supreme Court *(Serrano I)*[23]
2. the 1972-73 legislation passed in response to *Serrano I* (SB 90 and AB 1267) and struck down by the court in 1976 *(Serrano II)*[24]
3. a September 1977 response to *Serrano II* (AB 65),[25] which the *Serrano* plaintiffs' attorneys were preparing to challenge (one called it a "sham"[26]) before Proposition 13 was enacted and mooted the entire shared-cost program of the 1977 legislation

Because of the revolutionary changes wrought by Proposition 13, AB 65 was never implemented, but estimates of its fiscal impact are available.

The judicial standard and the constraints on and the motives for the legislative responses are clear. The standard set by the California court was "fiscal equity." If a shared-

cost system permitting local choice of spending level were to be retained as a feature of the system (and all three legislative schemes did retain it), then the state would be required to make every school district equally wealthy through a system of state taxation and aids. Thus, retention of local choice presented the legislature with the basic alternatives that by now have become classic in school finance litigation and reform. The legislature could either:

Level up. The state could treat all districts like the wealthiest district in the sense of guaranteeing high spending for low local tax rates. This choice avoids the extremely unpopular course of decreasing spending in the affluent districts, but its cost is a greatly increased state share and, therefore, a whopping increase in state spending. Or it could:

Level down. In order to avoid a major increase in state spending, it would be necessary to redistribute existing local property tax revenues from richer to poorer districts (by any one of a variety of available means). This would, of course, drastically cut spending in the richer districts or drastically increase property taxes in those districts.

The California legislature did what legislatures seem born to do; it compromised, repeatedly. Protection of the position of the wealthier districts seemed to be unquestioned, though the reason for this in a majoritarian process continues to be one of the paradoxes of the democratic system. In other words, California chose to level up, but it could not accept the fiscal consequences of full leveling up, so it leveled up part of the way. The effort to comply was strong: truly major increases in state spending occurred,* but compliance was not complete.

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* In 1968-69, the state's share of total education expenditures amounted to about 35.5 percent. By 1972-73, slippage (caused by constant foundation dollar amounts and continuing appreciation of local assessed property valuation) had reduced the state's share of total education expenditures to between 30 percent and 33 percent. Under AB 65, the state share would have increased to 41.7 percent. Thus, out of approximately $9 billion total revenues from all sources over five years, the state would have contributed approximately $4.6 billion under AB 65—if it had actually been implemented. A total of $3.6 billion would have been devoted to costs related to *Serrano* compliance (for example, increases in the

Principal changes in the structure of the legislation are listed in table 2.[27]

Table 2
Structure of School Finance Legislation in California

	Serrano Base Year 1970-71	SB 90, AB 1267 1973-74	AB 65 1978-79
Foundation Level*	$375	$765	$1,241
Flat Grant* (Basic Aid)	$125	$125	$120
Overrides	Yes	Yes	Yes (Power Equalized)
Revenue Limit	No	Yes	Yes
Slippage	No	Yes	Yes
Recapture via Minimum Tax and Guaranteed Yield	No	No	Yes (but minor)

*Elementary school districts, per ADA (including, where applicable, $20 unified school district incentive)

The basic strategy of the legislature was to raise the foundation level, theoretically including many more districts and greatly increasing state aid. The level never reached the richest district; however, even the $1,322 of AB 65 left 15 percent, or 645,000 pupils, above the equalization level.[28] Newly enacted revenue limits were even more significant. To avoid the fiscal drain implied by the higher foundation levels, the legislature limited the fractional increases by which poor districts were entitled to approach the level. In considering SB 90/AB 1267, the California Supreme Court

foundation level, termination of slippage, cost in implementing the guaranteed tax base component of the aid scheme). Another $197 million would have been incurred in implementing the "school improvement programs." An additional $586 and $196 million would have been incurred for aid to educationally disadvantaged and special children, respectively. Adapted from *Serrano (II)*, slip op. at 5-13; Rhodes, Frentz, and Marshall, footnote 8, at 1, 5, 8-9; D. McMaster and J. Sinkin, *Money and Education: A Guide to California School Finance* (November 1976).

expressly disapproved the legislature's attempt to postpone full equalization for twenty years through these limits.

Both SB 90/AB 1267 and AB 65 allowed districts to exceed the revenue limits by a local vote to "override." Naturally, this strongly favored more affluent districts because a smaller rate increase produces a larger absolute revenue yield in those districts. Finally, AB 65 introduced a modest approach to the leveling down strategy (redistribution of property tax revenues produced in wealthy districts—in effect, a step toward a statewide uniform property tax). AB 65 imposed a minimum tax of $1.80 to support the revenue limit. Amounts above the revenue limit yielded by this tax in very wealthy districts were to be recaptured. AB 65 also "power equalized"* amounts over the foundation level and all future tax overrides. The minimum tax was calculated to yield $41 million in 1981-82; the power equalization, $24 million. Even in combination, both amounts compared modestly to the $500 million total state aid package.

The combination of a higher foundation level and stricter limits on increases in total spending produced another classic pattern: decreases in local tax rates. In effect, if not design, school finance reform became local property tax relief.

From table 3,[24] it can be seen that AB 65 resulted in very little equalization. Revenue yields in poorer districts caught up in spending with those in richer districts very little, if at all. The major change produced by the large increase in state aid was tax relief: poorer districts and richer ones converged, but a significant tax advantage to the richer districts remained.

From the outset, plaintiffs' attorneys in *Serrano* used a particular rich district/poor district comparison to illustrate the effects of relying on the local property tax without compensating for variations in district wealth. Statistically, this type of comparison may be deceptive because it is between "outliers" (fiscally extreme districts); however, its simplicity

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* District Power Equalization (DPE) means that a given increase in tax *rate* produces the same dollars per pupil regardless of local wealth of the district.

Table 3
AB 65 Impact on Selected Unified Districts

	Assessed Value Per ADA	Total Revenue Limit* Per ADA			General Purpose Tax Rates		
District		*Prior Law*	*AB 65*	*Change*	*Prior Law*	*AB 65*	*Change*
Baldwin Park	9,422	1617	1787	170	4.79	3.34	-1.45
San Bernardino	15,617	1597	1745	148	4.52	3.41	-1.01
ABC	22,150	1602	1768	162	4.24	3.40	- .84
San Juan	29,618	1582	1767	185	4.34	3.69	- .65
San Diego	41,997	1589	1748	159	3.34	3.27	- .07
Piedmont	51,243	2049	2121	72	3.68	3.85	+ .17
San Francisco	106,300	2023	213?	109	1.90	2.13	+ .23
Emery	215,136	3198	3309	111	1.43	1.80	+ .37

*"Revenue limits" is a statutory term analogous to "budget ceilings" in New Jersey or "cost control" in other states. The actual mechanisms for controlling these "excess" expenditures vary from state to state.

and validity, in an absolute sense, cannot be denied. The use of district comparisons to show the effect of successive legislative responses is a commanding litigation tactic; it is also instructive for understanding the implementation process as well. The fate of Baldwin Park and Beverly Hills under the three legislative schemes is depicted in table 4.[30]

Table 4
Spending and Taxing in Two Communities under the Three Financing Schemes

	Initial Spending	SB 90	AB 65	Initial Tax Rate	SB 90	AB 65
Baldwin Park	$577	$1,617	$1,787	$5.48	$4.79	$3.34
Beverly Hills	840	2,810	2,862	2.38	2.25	2.61

For all the impetus toward fiscal equity from the court, Beverly Hills increased its spending by over $2,000 per pupil as a result of legislative responses to *Serrano*, while Baldwin Park managed just $1,200. Baldwin Park did get some tax relief. AB 65 did equalize districts serving 85 percent of the state's pupils. This major change from the earlier condition[31] was enough to give some of *Serrano's* plaintiffs' attorneys pause about bringing another lawsuit.

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Serrano implementation was thus an example of a clear output standard (fiscal equity) applied to a coalitional majority process (the legislature), where the degree of compliance was highly visible (because of prompt, sophisticated fiscal analysis). The legislature responded with incremental, successive approximations of the mandate, that is, successive compromise. The plaintiffs were forced to react in kind; at each additional response stage, they were forced to estimate whether the gains now exceeded the possible risks of further litigation. For example, the court, impressed by AB 65 and tired of *Serrano*, might issue a less favorable ruling. Did the anticipated benefits of additional litigation outweigh this risk? In the end, therefore, although plaintiff/implementers may have insisted throughout on a standard of perfection, they, too, may have found it prudent to compromise.*

Proposition 13 brought an unexpected and somewhat bizarre end to *Serrano* implementation. Proposition 13 stands as proof of a generality to keep in mind: sometimes implementation is drastically affected by completely independent and thoroughly unforeseen developments. The proposition provided four things:

1. No property should bear a tax of more than 1 percent.
2. Municipalities may impose "special taxes" by a two-thirds vote of the electors.
3. Assessments may not grow by more than 2 percent annually from their 1975-76 levels, to which they were rolled back, except for property sold after 1975-76.
4. No increase in state taxes may be enacted without a two-thirds vote of each legislature.[32]

These developments had their peculiar sides. Selection of the 1 percent figure, which had the effect of lowering statewide average local tax rates by 2 percent, was based on a misunderstanding of *Serrano*. Howard Jarvis, cosponsor of Proposition 13, was misinformed that *Serrano* had struck down property taxation per se and that schools would be taken off the tax rolls by 1981.[33] This would have lowered

* Plaintiff's Attorney McDermott purports to disagree: "There is no such thing as 'substantial compliance'. . . If a court judgment says you must pay me $3,750 and you pay $2,000 that's tough." Rhodes, Frentz, and Marshall, footnote 8 at 19.

property taxes to a statewide average of 1½ percent, schools accounting for about half of the property tax burden. Thus, Jarvis got exactly four times the property tax reduction he thought he was getting from Proposition 13. (To be fair, by the same logic, a 1 percent rate may also have been the ultimate goal.)

The limitation on "special taxes" led at least one municipality, Berkeley, to beat the deadline and authorize a number of new taxes on the eve of Proposition 13's effective date.[34] Other municipalities were not so farsighted. Also, use of the terminology "special tax" was a drafting error. The existing wording permits the cagey legal suggestion that there are forbidden taxes (for example, property taxes above 1 percent), special taxes (subject to the two-thirds limit), and other (not forbidden or limited) taxes.

The third provision guarantees a huge assessment increase when property is sold or improved. This "loophole" is producing most unusual economic distortions (for example, should property be rented rather than sold?) and an equal protection challenge.

The effects, though a bit strange, were nevertheless dramatic. By way of example, one house in Berkeley had its annual property tax bill lowered from $3,800 to $800. Despite *Serrano*'s principle of fiscal equity, there was little local revenue left to equalize. Regardless of the amount a 1 percent local rate would produce for the support of public education, almost no district's tax yield would come close to producing an adequate program. Proposition 13 imposes, in effect, a statewide local property tax of 1 percent. All districts will require state aid. Differences in spending among districts will now be the result of how state aid is distributed, not the result of variations in local wealth, which were the target of *Serrano*.

There may be irony in the fact that the conservatively motivated Proposition 13 instantly produced a state-centralized system of municipal and school finance. Lobbyists from local governments were literally sleeping on park benches in Sacramento because it is now the state legislature with its inflation-bred surplus that will determine the destinies of their clients. On the school side, one interesting result of this lobbying effort has been the "mandation" of certain pro-

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grams, like day care, by the state legislature. Some pressure groups for programs with a heretofore low priority locally seem to carry much greater clout in Sacramento.

This is not to say that *Serrano*-type issues are gone forever from California. The interim "bail out" bill, which used the enormous state surplus to fill in for missing local revenues, allocated aid to local districts based on a percentage of their previous year's budget.* As anything other than a transitory device, this interim solution would be a flagrant violation of *Serrano*. The local control justification for expenditure disparities, while never very persuasive, is now wholly untenable because of *Serrano*.

As a long-term solution, there is discussion of pulling schools off the local property tax rolls entirely, because the school/nonschool ratio of the tax varies so much around the state. Such a solution would leave no logical room for an interim principle of basing new expenditures on pre-Proposition 13 levels.

Of broader significance to the issue of wealth neutrality is the possibility that school services will be "privatized." If French, or auto repair, is too expensive for the government to offer, will proprietary schools meet some of the demand? If a first-class education becomes a matter of purchasing private-market supplements to a frugal public school system, the *Serrano* story will have a tragic ending, for the discrimination would then fall squarely on poor families rather than on poor districts, a class diverse with respect to family wealth.

New Jersey's Schizophrenia: Fiscal Equity or Basic Skills?

If "output or outcome" is an implementation dilemma, the wording of New Jersey's constitutional standard for

* Ch. 292, 1978 Cal. Stats. 755 (SB 154). A total of $2.2 billion was allocated to public elementary and secondary education to compensate for local revenue losses resulting from Proposition 13. Appropriations for the "bail out" were made from the state's approximately $3 billion state surplus.

education elegantly captures it. Schools in New Jersey must be "thorough and efficient."[55] Hoist on this tantalizing phrase, the New Jersey Supreme Court vacillated between statewide fiscal equity and a statewide basic skills program. The response of the New Jersey Legislature to the demand for fiscal equity was quite similar to California's, even though the standard itself was somewhat unclear and compromised. The basic skills mandate has generated a great deal of activity, the results of which are unknown.

In trying to have a little bit of both sides of a dilemma, the court (consciously) left a central question open. What happens if poor districts do not meet the basic skills standards remains the seed of future litigation. Will the court order the legislature to fill in the valleys of fiscal inequity to allow poor districts to reach the high plateau of an effective basic skills program? In a state like New Jersey[56] where urban districts are also almost all poor districts,* that is an even more important question than it would be in most other states.

The following discussion of *Robinson* implementation is in three parts: history of the litigation, analysis of the legislative response, and implementation of fiscal equity and basic skills.

A Short History of Robinson

The process of litigation and legislative response surrounding *Robinson* is somewhat more complicated than that surrounding *Serrano* since it involves three statutes, one trial court opinion, and seven supreme court decisions.

First Two Statutes and the Trial Court

In 1972, the superior court evaluated two school finance

* Specifically, "[t]hree fourths of the major cities in New Jersey are in the lowest wealth category [septile] and one of those cities, Newark, is the largest school district in the state. The new school finance system did not do much to ease Newark's plight: Educational expenditures are consistently below the state average and the tax rate is nearly double the state average." E. Thomas, *Newark School Finance Profile, 1977-78* (March 1978), p. i.

acts.* The initial provision was the school finance system in effect as of 1970, which featured a $325 foundation plan and a $100 flat grant (average spending was $800 in 1969-70). The second, the 1971 Bateman Act, amended the 1970 scheme by instituting, *inter alia*, a $30,000 open-ended resource equalizing grant, a $110 flat grant, and weighted funding for pupils with special needs (for example, from AFDC families). The Bateman Act was passed after *Robinson* was filed but before the superior court rendered its decision.

Thorough and efficient ("T & E"). Briefly, the court held that the foundation level of the first bill was too low to implement the New Jersey Constitution's mandate of a thorough and efficient education. If fully funded, however, the resource equalizer of the Bateman Act would probably reach this goal." Two antiequalizing features† of the Bateman Act could not be reconciled with the thorough and efficient clause so long as the revenues from these provisions

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* When *Robinson* was commenced in 1970 the State School Aid Law of 1954 was in force. Ch. 85, 1954 N.J. Laws 526 (codified at N.J. Rev. Stat. 18A: 58-1 et seq.). The 1954 finance scheme provided for a foundation aid scheme with a flat grant to all districts. On October 28, 1970, the legislature enacted the State School Incentive Equalization Aid Law (commonly known and hereinafter referred to as the Bateman Act). Ch. 234, 1970 N.J. Laws 823 (codified at N.J. Rev. Stat. 18A: 58-1 et seq.) (effective date July 1, 1971). Like the 1954 finance scheme, the principal components of the Bateman Act were an equalization aid and flat grant provision. Ch. 234, § 5, 1970 N.J. Laws 828-29 (codified at N.J. Rev. Stat. 18A: 58-5). The equalization mechanism in the Bateman Act, unlike the 1954 finance scheme, employed a guaranteed tax base rather than the prior foundation aid scheme. Since the legislature had failed to fully fund the equalization provisions of the Bateman Act and had limited the extent to which districts could depart from their pre-Bateman position (for example, by "save harmless" aid), it was not very clear which statutory scheme was actually reviewed by the trial court.

† *Robinson*, 287 A.2d 187, 221 (Law Div. 1972). The two provisions are (1) the flat grant provision (statutory term, minimum aid) that provides state aid to all, including high-wealth, districts, without regard to district fiscal capacity; and (2) the "save harmless" provision that guarantees all districts at least as much state aid as they had received under the last pre-Bateman year.

could be redistributed to improve existing inadequate educational conditions in poor districts.

The equal protection clause. What was good enough for the thorough and efficient criterion was not good enough for New Jersey state and federal equal protection provisions.* Equal protection required a much higher minimum support level,[58] a property tax rate equal throughout the state to support the higher level, and a provision to address the problems of municipal overburden and regressivity of the property tax. While unspecific about how high the minimum support level would have to be, Judge Botter thought that above this level local add-ons might be allowable.[59]

Robinson (I) and the Bateman Act

In 1973 the New Jersey Supreme Court in *Robinson (I)*[60] reversed Judge Botter on his ambitious and far-reaching equal protection holding (which would have apparently

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* *Robinson*, 287 A.2d, 212-16. The trial court's holding was jointly based on federal equal protection guarantees under the Fourteenth Amendment and the equal protection guarantees implicit in Article I, paragraph 1 of the New Jersey Constitution. *Id.*, 287 A.2d 212, 214, 216. Article I, section 1 of the New Jersey Constitution provides:

> All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

While the New Jersey Supreme Court recognizes article I, paragraph 1, of the New Jersey Constitution as the substantial equivalent of the Fourteenth Amendment to the United States Constitution, the New Jersey court has also found—where educational objectives are left to the states—that New Jersey constitutional protections may be more stringent than federal standards. Brooker v. Plainfield Bd. of Educ., 212 A.2d 1 (1965).

The trial court also found that the Bateman Act violated the tax uniformity provisions of the New Jersey Constitution. *Robinson*, 287 A.2d 215-216, *construing* New Jersey Constitution art. VIII, § 1, ¶ 1(a).

required substantially full state assumption of educational financing).[41] Under a system of full state assumption, the state legislature would have determined the level per pupil at which public educational services will be supported. The public education appropriation would then be allocated to school districts according to their actual resident pupil population. Of course, at legislative option, a full state assumption system could have reflected such diverse factors as district education price and cost differences or pupil weightings.[42]

The court's equal protection analysis is an interesting example of the interplay of state and federal constitutional law. *Rodriguez*,[43] decided the month before, cast a negative shadow on the ideas that education was a fundamental or more important interest than other services of state and local governments* and that poor families, as opposed to poor

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* In *Rodriguez*, the U.S. Supreme Court found that: "Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected." *Rodriguez*, 411 U.S. 35.

Apparently on this issue, *Rodriguez* persuaded the New Jersey Supreme Court that, even under the New Jersey Constitution, education could not be adequately distinguished from the host of other services provided by state and local government. In rejecting the "fundamentality" of public education for purposes of equal protection analysis, the court concluded:

> This is not to say that public education is not vital. Of course it is. Rather we stress how difficult it would be to find an objective basis to say the equal protection clause selects education and demands inflexible statewide uniformity in expenditure. Surely no need is more basic than food and lodging. . . . Essential also are police and fire protection, as to which the sums spent per resident vary with local decision. Nor are water and sundry public health services, available throughout the State on a uniform dollar basis. *Robinson (I)*, 303 A.2d 281.

districts, had a special claim for relief.* (The latter finding is ironic in that New Jersey may be the best case in the country for the poor person/poor district correlation.)

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* The question of whether the Texas school finance system unconstitutionally disadvantaged any "suspect class" was also central to the U.S. Supreme Court's consideration of *Rodriguez*. Curiously, it was not sufficient for the majority that the system discriminates because "some poorer people receive less expensive educations than other more affluent people," the definition employed by the federal district court and courts in other school finance cases. *Rodriguez*, 411 U.S. 19. Mr. Justice Powell, writing for the majority, found that such people were not absolutely deprived of education, nor could they be characterized as functionally indigent. *Id.* at 22-23, 25. Nor, Justice Powell ruled, could it find "that the poorest people—defined by reference to any level of absolute impecunity—are concentrated in the poorest districts." *Id.* at 23. Finally, Justice Powell held that wealth discrimination could not be defined as discrimination ". . . against all those who, irrespective of their personal incomes, happen to reside in relatively poorer school districts." *Id.* at 20. The Court ruled that this view suggests that the disadvantaged class includes every child in every district except the wealthiest. While this was precisely the complaint made by the plaintiffs, Justice Powell concluded without explanation:

> [t]he system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: The class is not saddled with such disabilities or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extra-ordinary protection from the majoritarian political process. *Id.* at 28.

However, the evidence for these "conclusions" is not to be found in the majority's opinion. Indeed, it may be argued, these "conclusions" are the very premises that the action was brought to test.

Despite these inadequate evidentiary underpinnings, the New Jersey Supreme Court evidently found *Rodriguez* persuasive on this issue as well. The court concluded:

> We hesitate to turn this case upon the State equal protection clause. The reason

Given the strong emphasis on federal equal protection analysis that had marked the trial court's opinion, the New Jersey Supreme Court faced a three-sided dilemma in reaching its decision. The New Jersey court could find that the trial court had based its equal protection holding on a construction of federal constitutional standards and that New Jersey's own equal protection guarantees were merely the substantial equivalent of the federal provision. The U.S. Supreme Court's decision in *Rodriguez* would be controlling law; therefore, the trial court's equal protection analysis could not be upheld. Conversely, the New Jersey Supreme Court could admit the persuasiveness of *Rodriguez*, but find that New Jersey's equal protection provisions imposed a more stringent standard. The trial court's decision could,

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> is that the equal protection clause may be unmanageable if it is called upon to supply categorical answers in the vast area of human needs, choosing those which must be met and a single basis upon which the State must act. The difficulties become apparent in the argument in the case at hand.
>
> . . . .
>
> Wealth may or may not be an invidious basis for the imposition of a burden or for the enjoyment of a benefit. Wealth is not at all "suspect" as a basis for raising revenues. As to the taxpayer, classifications depend upon or reflect wealth except in the rare case of a head tax. Whether wealth is invidious in its impact upon the enjoyment of rights or benefits is a more complex question, but again it cannot be said to be "suspect" in all settings. Obviously financial lack is a laudable basis when a statute seeks to ameliorate poverty. On the other hand, a net worth or poll tax requirement for voting is today arbitrary. *Robinson (I)*, 303 A.2d 283.

therefore, be upheld, while adhering to the equal protection analysis. The supreme court's third alternative was the most far-reaching. The court could rely exclusively on the trial court's construction of the New Jersey Constitution's substantive educational guarantee.[44] In fact, the New Jersey Supreme Court opted for this latter alternative. Without emphasizing the state/federal distinction, it found no equal protection violation, but did find that the school finance scheme failed to provide all children with a "thorough and efficient" public education.

With respect to the thorough and efficient clause, however, the supreme court was stricter than Judge Botter, holding that the Bateman Act was unconstitutional, not so much on substantive grounds (in which case the court would have instructed the legislature on what needed to be done in order to comply) as on procedural grounds that the state had not defined standards for a thorough and efficient education. Specifically, the court ruled:

1. The state must define what a thorough and efficient education consists of.
2. A thorough and efficient education must be guaranteed throughout the state.
3. Local property taxation may be retained, but, if it is, a local rate sufficient to produce a thorough and efficient education must be mandated by the state.
4. The Bateman Act is the product of "provincial interests" (apparently referring to the coalitional legislative balancing of rich versus poor districts) and bore no relationship to thorough and efficient education.
5. Although the shared cost system (local property tax plus state aid) could theoretically pass muster, the court was doubtful that the legislature could pursue thorough and efficient education substantively and retain that system.

Robinson (II): The First Remedial Order

Robinson (II)[45] came down a month later. Addressing the question of the remedial timetable left open by the first case, *Robinson (II)* held that new legislation must be available for the 1975-76 school year rather than the year immediately following (1974-75).

Robinson (III) and *(IV)*: Enforcement Action in the Face of Legislative Inaction

In *Robinson (III)*,[46] the court held in January 1975 that, because no legislation for the 1975-76 year had been passed, the court would hear argument on what to order with respect to the distribution of state aids in 1976-77 (a provisional remedy until the legislature did act).

In May 1975 the court, in *Robinson (IV)*,[47] returned to something first ordered by Judge Botter in the trial court: redistribution to poor districts of "save harmless" aid and the flat grants (save harmless aid was designed to protect districts from aid reductions from the previous year's aid level caused by the operation of the general aid formula). Justice Pashman dissented on grounds that a more extensive redistribution was justified.[48] Two other justices thought less drastic action was needed.[49] This order of the court, thus, deftly removed those parts of the existing system that most benefitted the wealthier districts without calling for any new appropriations. The court also strongly implied that if a comprehensive legislative response to its 1973 *Robinson (I)* decision was not forthcoming in time for the 1977-78 school year, a more drastic judicial remedy would be ordered.[50]

The message was not lost on the legislature. Four months after the court's provisional remedy, Governor Brendan Byrne signed the Public School Education Act of 1975 into law.[51] Like the Bateman Act, the 1975 act retained the shared cost (both state and local fiscal responsibility) equalization scheme of the pre-*Robinson* finance system: a modified guaranteed tax base plan.[52] The actual guaranteed tax base level, however, represented a significant increase over the Bateman guarantee. As of 1971, the Bateman Act provided a guaranteed tax base of $33,000 per pupil.[53] Under the 1975 act the guaranteed tax base was $86,000 per pupil at the time of the court's consideration of facial constitutionality.[54] The 1975 guaranteed tax base increased the state's share to approximately 40 percent of total educational costs. This rather significant increase was potentially offset by another provision of the 1975 act. Specifically, the act provided for a structural limitation on equalization efforts by creating a ceiling on expenditure increases.[55] This provision

effectively barred lower spending districts from catching up to the expenditure levels enjoyed by New Jersey's high property-wealth districts.

The 1975 act also retained two other antiequalizing elements: a flat grant and a save harmless provision.[56]

Under the 1975 act, the state also assumed full funding of all pupil transportation costs and provided for a pupil weighting system for funding special education throughout the state.[57] While these provisions do not, on their face, contravene the expenditure equalization mandate of *Robinson (I)*, their actual impact may be antiequalizing.

Robinson (V): Facial Constitutionality of the 1975 Legislation—Triumph of the Outcome Standard

Robinson (V)[58] found the 1975 act constitutional on its face. The 1975 act did not change the fiscal structure of the Bateman Act much at all. Like California's AB 65, it provided a more generous minimum support level ($86,000 compared to the previous $33,000), while preventing poor districts from reaching the level by revenue limits. Flat grants and modified save harmless aid were also retained.

Why was a law similar to the one originally struck down now declared constitutional? Because the legislature had complied with the substantive aspect of *Robinson (I)* by ordering that the commissioner of public education establish standards for a thorough and efficient education throughout the state and take steps to see that all districts achieved the standard. The five opinions range from charitable assumption, through skeptical concurrence, to outright dissent on the fiscal issues. The three-justice per curiam opinion assumed that the fiscal steps necessary to achieve the educational results would be taken later regardless of what the act currently said about state aid.* Justice Schreiber

* In discussing the powers and limitations of the commissioner under the 1975 act, the court's opinion appears to afford the commissioner the power unilaterally to initiate modifications in the budgetary level ("compel an increase in a local budget above that fixed by local authorities") as well as to effect internal reallocations among school district budget items authorized in

concurred, while stating a minor reservation about what should be done if the legislature failed to fund the act.* Chief Justice Hughes concurred (to make a five-justice majority), but expressed the strongest possible skepticism whether the fiscal structure of the act would prove capable of sustaining its substantive goals.

Justice Conford, temporarily assigned to fill a vacancy, dissented on the fiscal issues in an opinion notable for what the per curiam opinion was totally lacking in—a quantitative analysis of the fiscal impact. Justice Pashman, most impatient with the legislature, dissented across the board, objecting to evaluation of the law on its face and asking for a plenary trial on all the issues, including the specifics of how basic skills could be taught and how the commissioner of

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section 15 of the act. *Robinson (V)*, 355 A.2d 135-36, *construing* ch. 212, § 15, 1975 N.J. Laws 879-80 (codified at N.J. Rev. Stat. 18A:7A-5). Section 28 of the act also authorizes the commissioner to review and determine the adequacy of the proposed budget submitted annually by school districts. Ch. 212, § 28, 1975 N.J. Laws 885 (codified as N.J. Rev. Stat. 18A:7:-23).

* The final section of the majority's opinion evinces a telling comment on the *Robinson* implementation process:

> The Court retains jurisdiction of the cause for the purpose of effectuating the following directions. If the legislature does not . . . enact a provision for the funding in full of the State aid provisions of the 1975 Act [by April 6, 1976] the Court will . . . order one or more of the following: A. Direct a redistribution of such monies for State aid to schools . . . for payment of current expense equalization support. . . ; B. Order such injunctive relief as may be appropriate and necessary. . . . *Robinson (V)*, 355 A.2d 139.

If the legislature were to fail to fully fund the act, both Justices Pashman and Schreiber would add the additional threat of enjoining local tax collection and instituting (in the place of the existing local levy) a uniform statewide school tax. In effect, both justices advocated court-ordered full state assumption. *Id.* at 143 (Schreiber, J., concurring); *Id.* at 187-88 (Pashman, J., dissenting).

education could guarantee that they would be. Since the trial would not be held, Pashman went on to find constitutional fault in every provision of the law that was not fiscally neutral.

Thus, three justices—Hughes, Conford, and Pashman—probably could be counted on to declare the 1975 act unconstitutional for lack of fiscal neutrality; the rest of the justices might well concur, if and when the basic skills program is shown not to work. Of course, because personnel on the court are always changing, these extrapolations are of limited predictive value.

Robinson (VI) and *(VII)*: Enforcement in the Face of No Funding

Having declared the 1975 act constitutional on its face in January 1976, the court was forced to deal with failure by the legislature to appropriate funds for the following school year. *Robinson (VI)*[59] is a hallmark of judicial confrontation with the legislative branch. The New Jersey Supreme Court ordered that no spending for schools take place until the legislature funded the act. Under this pressure, a politically controversial income tax was passed; the 1975 act was funded; and, on July 9, 1976, in *Robinson (VIII)*,[60] the court dissolved its no-spending order.

Analysis of the Legislative Response

The Public School Education Act of 1975 is a typical product of the majoritarian process that governs the way in which a legislature responds to the imperatives of the judicial branch. The effects of this process on the legislation are evident both in its attempt to achieve fiscal equity and to institute a basic skills program without significantly altering the existing allocation of power or privilege.

Fiscal Impact of the Act

The fiscal impact of the state aid provisions[61] of the 1975 act can be illustrated from table 5, constructed from a paper by Margaret Goertz, "Where Did the 400 Million Dollars Go?"[62] (400 million dollars was the amount of new state aid provided by the act). Figures are for the 1977-78 school year

and reflect the combined impact of the various parts of the aid package (increased support level, revenue limits, flat grant, compensatory education aid).

Table 5
Fiscal Impact of 1975 Act Compared to Bateman Act

Districts by Eq. Prop. Value per Pupil	Total State Aid per Pupil		School Tax Rate (Current Exp.)		Current Expenditures	
	Old	*New*	*Old*	*New*	*Old*	*New*
Lt 30,000	961	1247	2.11	1.56	1493	1803
30,000-49,999	555	966	2.27	1.60	1454	1795
50,000-69,999	227	660	1.98	1.56	1530	1893
70,000-89,999	196	303	1.85	1.69	1726	2084
90,000-109,999	189	317	1.47	1.40	1707	2059
110,000-129,999	204	338	1.32	1.22	1938	2333
130,000 & over	216	333	0.85	0.79	2064	2473
State Average	376	679	1.75	1.47	1609	1960

The pattern closely resembles the impact of California's AB 65. Total state aid per pupil rose about $300. No category of districts gained less than $100 per pupil, even the richest, evidence of the counterequalizing tendency of legislative politics. As expected, the biggest winners (in the range of $300-$400 increases) were the districts poorer than the minimum support level of $86,000, especially the ones substantially poorer. The very poorest districts gained relatively less because they were relatively more aided under the Bateman Act. To gain an idea of the significance of the $86,000 equalization level in terms of pupils, we can borrow data from Justice Conford's dissent in *Robinson (V)*,[63] contained in table 6.

Table 6
Effects of Two New Jersey Finance Laws on Equalization for the 1976-77 School Year

	Bateman Act	1975 Act
Number of Districts Equalized	157 of 578	368 of 578
Percentage of Districts Equalized	27.2	63.7
Percentage of Pupils Equalized	38.5	73.5

The figure comparable to 73.5 (percentage of pupils equalized) for California's AB 65 was, it will be recalled, 85 percent.

Returning to table 5, consider what the effects of the increased aid were on taxing and spending. As in California, the new aid package did not result in poorer districts catching up with richer ones. The average gain in aid was about $350 per pupil, and all districts, including the richest, cluster around that figure. Districts in the two richest categories gained the most. What, then, happened to the small overall state aid increase to the poorer districts? As in California, the answer seems to be tax relief.* Although, unlike California, districts in every category experienced local tax rate declines, the declines in the poorer districts were more substantial.

In conclusion, the New Jersey Legislature eventually responded to the *Robinson* court's call for fiscal equity in about the same way that California did to *Serrano*. *Robinson (I)* did not make clear how much equality was required, while *Serrano (II)* did; but the legislative responses were similar. Based on the data presented in table 6 (73.5 percent of New Jersey's pupils equalized vs. 85 percent of California's), it might be concluded that a slight edge in "equalization effort" goes to California, perhaps the result of the clearer and more stringent judicial standard.

Development of the Outcome Standard

Interpretation of what a "thorough and efficient" education means, other than adequate resources, went through several critical developments. The first and most important was the decision in *Robinson (I)*, emphasized in *Robinson (V)*, that a thorough and efficient education guarantees an education outcome. This outcome was defined as an education that works, that is "efficient" in the sense of being *effective*. The second issue was whether effectiveness referred to minimum performance in basic skills or a variety of performance goals depending on the particular child and

* This event had been foreseen by the trial court. *Robinson*, 287 A.2d 213.

situation. Close on the heels of this second issue was the connected issue of whether mastery of basic skills should be measured against a statewide standard of performance on a standardized test, or some other way.

Through a merger of the *Robinson* mandate and the basic skills movement in politics, an effective education in New Jersey came to mean both a plan in every district to achieve educational objectives for every child and a plan to impart mastery of basic skills to children who scored below a minimum on a statewide standardized test.* The New Jersey Education Association fought very hard for a particular process by which these plans were to be achieved. Finally adopted, this approach called for local school districts to develop their own plans for the accomplishment of various educational objectives, for all sorts of children, using various measurement devices. To the educators, this was the professional approach; but to the legislature, pressured by an odd coalition of conservative business interests and urban minorities,† this was the same as no standards at all—management by objectives without any clear or manageable objective.

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* Except for a limited modification of the 1975 act establishing a minimum, uniform statewide standard for basic communication and computation skills, the 1975 act perpetuated the preexisting division of responsibility for public education in New Jersey. Under the 1975 act, as under the pre-*Robinson* authority scheme, the state holds only titular responsibility for public education. Local school districts continue to determine the nature, scope, and quality of public education. The 1975 act's most salient change in the operation of New Jersey's education system was to institute a complex system of information management. *See* the Appendix for a more extensive description of the structure and provisions of the 1975 act.

† Carlson, Politics of Reform, footnote 22, at 7-10; Carlson, footnote 17, at 4-5, 7, 10, 11. Carlson's interviews suggest a wide range of motivation for the conservative legislator/business/urban coalition to pass the statewide minimum standards amendment, enacted as Ch. 97, 1976 N.J. Laws 480. The imputed motivation for conservative support was both their traditional emphasis on mastery of the three Rs and a somewhat less noble desire on the part of a few legislators to embarrass their otherwise highly vocal

Therefore, the act and its implementing regulations also contain provisions for state control and supervision. The commissioner is mandated to administer a statewide, objective, basic skills test.[64] Each school district is required to establish a basic skills goal and interim goals toward the ultimate basic skills goal.[65] The districts must also establish plans for achieving the goals, and the commissioner must annually review these goals and plans. After reviewing the progress and remedial plans, the commissioner is statutorily entitled to disapprove the plan and order that a new plan be prepared, or to disapprove the new plan and, after a hearing, order specific changes.[66] If such changes are not sufficient, in the commissioner's view, he may recommend that the State Board of Education take further action.

Under section 15 of the act, the state board is empowered to issue administrative orders to remedy educational failure in districts identified by the commissioner.[67] In effect, the state board acts as an adjudicator, and the commissioner acts as investigator/prosecutor. Under sections 15 and 16 of the act, the New Jersey Superior Court acts as the instrument for appellate review and enforcement of the state board's administrative orders.[68] At this time, the scope of superior court review is unclear, however.

Under the act as amended, the commissioner's powers are also circumscribed. The commissioner's information-gathering powers are limited to data gleaned from the statewide testing program and district annual reports.[69] Pursuant to rules and regulations established by the state board, the commissioner has a mandatory duty—under section 44 of the act—to ascertain the thoroughness and efficiency of operation of the state's school districts.[70] Since the state board's authority is limited to "such powers of visitation as

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opponents in the urban centers. Business interests seemed most concerned with the direct economic cost of educational failure. Urban advocates of minimum statewide standards were also directly motivated by constituent interests: the economic and social cost of the educational inadequacy of schooling in their areas. In desperation, urbans were willing to risk the potential stigma involved in reporting the results of statewide tests for the potential benefits of educational reform.

are necessary for proper administration of the act," the commissioner's powers (under section 44) appear limited to site visits.[71]

The commissioner's remedial powers are limited to budgetary changes, modifications in district inservice training programs, and the power to mandate districts to prepare remedial plans.[72] Presumably, the commissioner can also advise the state board on remedial provisions of a proposed administrative order.[73] The act does not authorize the commissioner, himself, to issue affirmative orders governing any issue of substantive educational policy. Nor does the act authorize the commissioner or the state board to take any school district into receivership, order the replacement of any district employee, appoint masters, retain expert witnesses, subpoena (and depose) witnesses or documents, close inadequate educational facilities, or issue civil contempt citations for noncompliance. Of course, these and other equitable remedies are available to the superior court; therefore, ultimate enforcement of the act may rest with the court.

The regulations go slightly further. They authorize the commissioner to *classify* each district as approved, disapproved, or conditionally approved, based on monitoring of progress and review of the annual plans (that is, unlike the statute, the regulations not only authorize him to approve or disapprove but require him to do so).[74] Both the broad educational plan and the specific basic skills plan are supposed to be part of the review and classification.[75]

Thus, the statutory structure created in a response to *Robinson* contains "something old and something new." New Jersey is still wedded to a mixed system of state and local control, but the locus of formal power has changed. Given the vagaries and inconsistencies in this structure, the ideologies and personalities of the actors may well be the decisive factor in determining the number, nature, and scope of potential educational innovations.

Some Notes on Implementation

At this point, it is difficult to establish the content of the various district plans and what their effects might be. The National Institute of Education funded major implementation studies, and some preliminary analysis from those is

available.[76] In addition, I spoke on the phone with Paul Tractenberg, who, as a representative for the NAACP and the American Civil Liberties Union, may deserve more credit for *Robinson* than any other single lawyer.[77] Highlights gleaned from these sources probably provide an adequate basic understanding of the implementation process.

Results of the Basic Skills Test

The proper kind of test to administer and the particular test itself have been lively issues. Under both the present and earlier versions, it appears that the poor urban districts are in a position of massive failure, but that some districts with previously high reputations got a black eye as well. Results from the April 1978 administration of the test are compiled in table 7.[78]

Table 7
Percentage of Students Scoring below Statewide Minimum Standard in One Selected District Compared with State Average

	New Brunswick			State Average		
Grade	*6*	*9*	*11*	*6*	*9*	*11*
Reading	62.5	62.2	30.4	23.1	28.5	9.3
Math	84.1	81.2	57.1	33.4	25.9	18.9

Although there are perhaps insurmountable problems of comparability, both across the different tests and across grades within a particular test, the results for an affluent area on the different 1976-77 test are, nevertheless, interesting and probably somewhat representative of the range of variation on the high side. These results are presented in table 8.[79]

Table 8
Percentage of Students Scoring above Statewide Minimum Standards in One Selected District

	Glen Rock		
Grade	*4*	*7*	*10*
Reading	98.4	88.4	93.2
Math	94.6	83.1	91.7

Results like these give rise to a flood of questions and problems. One category of questions concerns what happens in the case of massive failure. In a district where 84 percent of the pupils fall below a minimum standard, it is absurd to think of a basic skills program as a "compensatory education" program in the sense of a *separate* remedial program. Does this mean a restructuring of the entire local program? Or a restructuring even more narrowly toward a particular test? What will minority group representatives think if public education in their districts apparently has lower goals than in other districts? Another set of questions surround the problem of failure. Is it possible to change these scores very much and in a way that gives something valuable to the child? How much would a successful program cost, and is the money available? Will extremely modest progress goals be accepted by the commissioner? Will he be sued successfully if he accepts low goals?

Fiscal Issues

Contrary to preexisting legal authority, the court in *Robinson (V)* went out of its way to aver that the commissioner had authority under the act to make budgetary changes, though the power to order budgetary increases—particularly if increases are to come out of increased state aid rather than a local property tax increase—is far from clear.[80] The issue remains, however, of what will happen if a poor district is shown, by the commissioner or by someone bringing a lawsuit, not to be making sufficient progress.

At this point, the results have been disappointing to advocates of the poorer districts. Big-city mayors are apparently keeping urban districts below their revenue limits; only affluent districts are seeking waiver of the budget caps. The commissioner has been entirely silent about any need for new money, perhaps because his reappointment hinges on the goodwill of a governor who stresses budgetary restraint. With the political process generating no pressure for more expensive programs in urban areas, pressure will come, if at all, from further litigation.

Basic Posture of the Commissioner

In holding the 1975 act constitutional on its face, the

court in *Robinson (V)* relied on the fact that the commissioner of education and the state board had been given a "vast grant of power"[81] to see that a thorough and efficient education was carried out in New Jersey. The commissioner is the initiator in the process, the one who, in Bardach's terms, must be the implementation "fixer," in order for the process to work.[82] What has his position been? Apparently, he has taken the extreme "hands off" position, complying with the mandate to administer the statewide tests, but not pushing for changes in programs. Although the regulations did not provide for delay in the system of classifications, the commissioner chose to defer classification for five years. His decision was upheld in court. Moreover, in the crucial matter of approving or disapproving local plans, he has apparently taken the position that "thorough and efficient is whatever the local district says it is" and has not disapproved any plans (claiming that to do so now would be premature). There is evidence that the state education department, charged with monitoring results and keeping track of plans, is disorganized and confused, unable even to compile in one place its own thorough and efficient policies and guidelines.[83]

Future Litigation

Although the commissioner has publicly claimed dramatic results from some of the basic skills programs (without divulging specifics), the most natural conclusion to draw is that the outcome model is breaking down, particularly in the promise of *Robinson (V)* that increased funding could flow to the districts with the worst educational problems. Much bureaucratic activity has taken place (paper plans, programs, and so forth), without assurance that the districts are doing much differently than they did before, or, if something different is being done, what the results are, if any. The "vast powers" of the commissioner and the board are dormant, suffering from passivity and delay.

The prospect exists, therefore, of renewed litigation. *Robinson* lawyers are considering at least two approaches. A renewed effort could be made to have the court declare statewide fiscal neutrality as the standard, in recognition that *Robinson (V)*'s optimism on this point has not been fulfilled. Alternatively, suit on behalf of the urban districts could be

undertaken, either directly against the state (for more resources) or against the commissioner (to compel him to discharge his duties), or against both. These alternative approaches are somewhat inconsistent, a fact contributing to indecision and delay among the lawyers and their clients. (There has always been tension in school finance litigation between those favoring statewide fiscal equity and those favoring special help for urban districts with severe educational problems, even if the urban districts, as entities, are not poor.)[84] Also looming obscurely over the question of "when to sue" is the somewhat credible argument by the state that the system ought to be given time to work, if only for strategic reasons.

Conclusion: Justiciability and Judicial Resolve

The paradigm of implementation set forth at the outset of this paper seems supported by *Serrano* and *Robinson* developments. Clear output standards, like fiscal neutrality, encounter compromise from the majoritarian process. The enforcement problem is then one of confrontation with another branch of government—intrusion into the legislative function of appropriation, and the like. Crises of confrontation may result, as when the New Jersey court ordered the schools closed. Ultimately, the process of confrontation and compromise may reach the point of "substantial compliance," where litigators decide that the benefits of holding back exceed the costs of going on.

Vague outcome standards encounter the majoritarian response of "output substitution"—going through the motions of change (setting goals, making plans) without changing the substance much, and without changing the outcome. In a sense, the basic skills test score is a clear standard, but no one knows very much about how to achieve it. Hence, the standard for what the state is supposed to *do* is vague. If the outcome-oriented plan fails to achieve its intended results, the question will be whether to change the outputs (more money, different programs) or abandon the effort. I probably should not be so entirely pessimistic. At some point, the goal might be at least partially achieved,

and then the question would reemphasize "substantial compliance" considerations to the outcome side—should more be pushed for?

The interesting aspect of these developments is that the *positive* model of "implementation difficulties" has also been suggested as a *normative* model of judicial intervention and nonintervention. Ancient equity jurisprudence as well as modern doctrines of *justiciability*[85] suggest that a court should stay its hand when:

1. Judicially discoverable and manageable standards are lacking for determining the rights and duties of the parties.
2. Judicial action, even if effective to grant relief to the complainants, would intrude too deeply into the affairs of another branch of government (a coordinate branch, like the legislature or executive, at the same level of government, raising the problems of "separation of powers") or another level of government (as when the federal judiciary grants relief from the acts of state officials, raising the problem of "federalism").*
3. Judicial relief cannot be effectual.

Since, on the one hand, all public law litigation involves these problems more than traditional litigation, rigorous application of the principles would eliminate public law litigation altogether. Public law litigation is characterized by problems of defining standards, intergovernmental conflict, and difficulties of enforcement.[86]

On the other hand, there is a point at which difficulties of implementation ought to discourage judicial action. Better to be discouraged prospectively than to learn through failure at great cost and embarrassment. Where to locate the proper point for prospective doubt is a matter of practical wisdom, but it also depends on one's zeal for the rights of individuals and minorities; and this, to me, is the crucial understanding.

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* The Burger Court has placed an ever-increasing emphasis on both the separation of powers and federalism doctrines. *See, e.g.*, Rizzo v. Goode, 423 U.S. 364 (1976), for the Burger Court's position on federalism; *see generally*, Nagel, "Separation of Powers and the Scope of Federal Equitable Remedies," 30 *Stanford Law Review*, 30 (1978), p. 661.

A burgeoning literature exists liberating courts for their supposedly clumsy and even oafish attempts to produce social change.[87] The argumentation that supports such negative verdicts ought to be closely examined; to me, much of it does not bear even superficial examination.

It is easy to isolate difficulties of implementation and very hard to demonstrate success. Of course, it is also easy for rights zealots to be fatuously optimistic, especially since litigators and advocates may not require success for the client as an adequate reward for action. The general point is simply that the importance of implementation difficulties as a reason for withholding judicial action will vary greatly according to how important or unimportant the relief seems. Advocates of the rights of those on whose behalf litigation is brought presumably should prefer the partial victory and the courageous, tenacious judge to a doctrine of justiciability that would stay the judicial hand because of possible confrontation and difficulties of relief.

Where do *Serrano* and *Robinson* stand in this calculus? I will go out on a limb to say that both lawsuits produced substantial, gratifying change toward fiscal neutrality. That a substantial part of the relief went to taxpayers rather than school children was disappointing, if not surprising. Whether *Robinson's* great experiment in effective education will work no one knows. It faces virtually the maximum possible quantity of implementation difficulty; yet, if basic skills levels improve even somewhat, who will say that the lawsuit was wasted?

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Appendix

To appreciate the limited change made in the authority scheme of New Jersey public education by the Public School Education Act of 1975, it is necessary to examine the act in detail. The following analysis attempts to describe the structure of the act and its relationship to the *Robinson (I)* mandate.

As enacted, the 1975 act essentially codified the process "equalization" model advanced by the New Jersey Department of Education. The department's model consisted of the following six steps:[88]

1. goal development
2. assessment objectives establishment
3. needs identification
4. education program development and implementation
5. program effectiveness evaluation
6. budget review

The model's salient features are that it (1) delegates substantive education policy-making to local school districts, so long as these policies are formulated through the prescribed process; and (2) institutes a complex information-reporting system. Specifically, the act encodifies the process model according to the scheme outlined in table 9, which begins on the next page.

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Table 9
Functional Analysis of New Jersey Education Reform

Model Element	Citation**	Content of Provision	Level of Responsibility LEA	State
(1)Goal Development	7A:6(a)*	Establishment of goals and standards		A
	7A:6(b)	Rule-making power for procedures on establishing goals and standards		A
	6:8-2.1(b)	Designated "outcome" goal topics itemized		
	6:8-2.1(c)	Designated process goal topics itemized		
	7A:8	Review and update of goals and standards at least once every five years		A
	6:8-3.2	Development of goals based on education needs	B	
(2)Assessment Objectives Established	7A:7*	Establishment of *particular* goals and objectives	B	
	6:8-3.1	Development of annual plan providing for: implementation time schedule; assessment and evaluation standards for long- and short-range objectives (in consultation with chief school administrator)	B	
(3)Needs Identification	7A:9	Direct comprehensive needs assessment based on state goals and standards (in cooperation with local school districts) at least once every five years		C
	6:8-3.4(b)	District and school needs assessment to determine status of long- and short-range objectives	*	
	6:8-3.4(a)	Pupil needs assessment of educational objectives attainment by teaching staff of district, specifying general procedures	*	
	6:8-3.8(a)	Entrance level and annual pupil assessment of minimum proficiency mastery	*	
(4)Education Program Development and Implementation	6:8-3.5	Curriculum development (in consultation with teaching staff)	*	
	6:8-3.8(b)	Establishment of preventive and remedial programs; application and approval criteria for state compensatory program funding.	*	

A = State Board of Education B = Board of education C = Commissioner

* Level of responsibility not explicitly specified; context suggests that the school district board of education is the responsible entity.

Model Element	Citation	Content of Provision	Level of Responsibility LEA	Level of Responsibility *State*
(5)Program Effectiveness Evaluation	7A:10	Develop and administer uniform, statewide system of performance evaluation for each school, based on annual test for achievement in the basic skills and other means deemed necessary to: (a)determine pupil needs (b)ensure pupil progress, and (c)assess educational objective achievement		C
	6:8-6.1(a)	Conduct an annual uniform, statewide evaluation to ensure each district is performing according to law		C
	6:8-6.2(a)	Classify districts and schools within districts as approved, approved with conditions, unapproved		C
	6:8-6.1(e)	Each district and each school within each district shall be monitored by person designated by the commissioner		C
pupil and district	7A:11*	Annually report each district's progress in compliance with goals, standards, and objectives of the act	*	
	6:8-3.7	Development and implementation of evaluation procedures to provide for continuous review of pupil progress toward district and school goals and program objectives (conducted by teaching staff in consultation with parents, reported annually to district board by chief school administrator)	*	
	6:8-6.1(b)	Report district and school progress in achieving goals, objectives, and standards (level unspecified)	B	
	7A:12	Report on effectiveness of act to governor and legislature four years after effective date of enactment		A
state	7A:13	Biennially report (beginning four years after effective date of enactment) to legislature		G
(6)Budget Review	7A:25	Approve board of education request to override budget limitations		C

A = State Board of Education B = Board of education C = Commissioner G = Governor
* Level of responsibility not explicitly specified; context suggests that the school district board of education is the responsible entity.

Table 9 continued

Model Element	Citation	Content of Provision	Level of Responsibility LEA	State
(6)Budget Review	7A:28	Determine adequacy of school district budgets with regard to annual reports submitted under § 7A:11		C
district	6:8-5.1	Determine adequacy of school district budgets with regard to long- and short-range objectives		S
	6:8-5.1	Submit yearly proposed budget to county superintendent	B	
	7A:17	Report pupil membership by category to commissioner	B	
	7A:21	Recommend revision of or addition to cost factors schedule to legislature		G
state	7A:27	Determine amount necessary to implement act statewide and amount payable to each county and district		C
(7)Compliance Enforcement	7A:14[a] and 6:8-7.1(a)	Upon finding of failure to show progress toward the goals, guidelines, objectives, and standards of the act (based on evaluation results and reports submitted under §§ 7A:10, 11), direct school district to prepare and submit a remedial plan for approval.		C
	7A:14[a]	If the remedial plan is inadequate under § 7A:15, order district to show cause why corrective action should not be ordered.		
	6:8-7.1(a)	Applies § 7A:14 to districts classified as approved conditionally or unapproved		C
	6:8-7.1(b)	Upon plan approval, assure implementation of remedial plan in timely and effective manner		C
	7A:15 and 6:8-7.2	Corrective action for district failure to show progress; power to:		
	(b)1.	(a)order budgetary changes		C
	(b)2.	(b)order inservice training for teachers or other personnel		
	(c)	(c)recommend specific remedial plan to the state board		C
	6:8-7.3(a)	(d)issue administrative order specifying remedial plan, including budgetary changes or other measures as appropriate		A

A = State Board of Education B = Board of education C = Commissioner
G = Governor S = County Superintendent

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Ostensibly, the 1975 act purports to address the focus of the *Robinson* mandate—the substantive educational problem of assuring that New Jersey's schools effectively prepare children for adult roles in a complex society. In effect, the court had ordered the legislature to identify and define the education necessary for a child meaningfully to participate economically, politically, and socially in contemporary American society. Under *Robinson*, the legislature was required to assure that every child then mastered these requisite educational skills.

The legislature chose to effect this goal through almost complete abdication of policy responsibility to the administrative expertise of the state Department of Public Education. After echoing the *Robinson* mandate that New Jersey's educational system prepare a child to be an effective citizen and a competitor in the labor market, the legislature enacted a two-tier system of delegation. Under the 1975 act, the State Board of Education is responsible for establishing "goals and standards which shall be applicable to all schools in the state, including uniform statewide standards of public proficiency in basic communications and computational skills . . . , reasonably related to those levels of proficiency ultimately necessary [for] individuals to function politically, economically and socially in a democratic society."[95]

However, the act also recognized a second, previously existing, tier of responsibility. Autonomous local boards of education were delegated responsibility for establishing particular educational goals, objectives, and standards.[96] Of course, these local school districts retained authority, under the 1975 act, for actual implementation of *Robinson* and day-to-day management of public education. Since the very process of establishing localized, particular education goals defeats statewide uniformity, it is difficult to understand how, on its face, the 1975 act as amended can comply with the *Robinson* mandate.

Footnotes

1. Memorandum Opinion *re* Intended Decision; Judgment, Findings or Fact and Conclusions or Law, No. 938.254 (Super. Ct. Cal. Apr. 10, 1974), *summarized in* [1972-1974 Transfer Binder] Pov. L. Rep. (CCH) ¶ 18,835 [hereinafter cited as *Serrano (II)*, slip op., Judgment, respectively], *aff'd* 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1977), [hereinafter cited as *Serrano (II)*], *cert. denied sub nom.* Serrano v. Clowes, 432 U.S. 907 (1977).

   Previously the California Supreme Court, in 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971) [hereinafter cited as *Serrano (I)*], had reversed the appellate decision affirming trial court demurrer, 10 Cal. App. 3d 1110, 475 P.2d 441, 89 Cal. Rptr. 345 (1970), and remanded the case for trial on the merits.

2. 118 N.J. Super. 223, 289 A.2d 569 (1972), *supplemental op.*, 119 N.J. Super. 40, 289 A.2d 569 (Law Div. 1972), *aff'd on state constitutional grounds*, 62 N.J. 473, 303 A.2d 273 (1973) [hereinafter cited as *Robinson (I)*], *cert. denied sub nom.* Dickey v. Robinson, 114 U.S. 976 (1973).

3. In *Serrano (II)*, the California Supreme Court found that the state's financing scheme violated the equal protection provisions of the California Constitution, art. I, § 1 and art. IV, § 7, respectively. In contrast, the New Jersey Supreme Court based its *Robinson* decision on the education clause of the New Jersey Constitution, art. VIII, § 4.

4. *See Serrano (II)*, 487 P.2d 1249-63; *Robinson (I)*, 287 A.2d 213-16.

5. 411 U.S. 1 (1973).

6. Chayes, "The Role of the Judge in Public Law Litigation," *Harvard Law Review*, 89 (1976), p. 1281.

7. Ibid., p. 1291.

8. S. Rhodes, A. Frentz, and R. Marshall, Jr., *AB 65: California's Reply to Serrano* (March 1978), p. 1.

9. Stephen Wasby's work is typical of the level of sophistication, orientation, and methodology of "impact" research. *See* S. Wasby, *The Impact of the United States Supreme Court* (1970). *See also* T. Becker and M. Feeley, eds., *The Impact of Supreme Court Decisions*, (2d ed. 1973); K. Dolbeare and P. Hammond, *The School Prayer Decisions* (1971); Milner, "Comparative Analysis of Patterns of Compliance with Supreme Court Decisions: *Miranda* and the Police in Four Communities," *Law and Society Review*, 5 (1970), p. 119, *reprinted in Compliance and the Law*, eds. S. Krislov, *et al.*

(1966), [hereinafter cited as *Compliance and the Law*], p. 297.

10. D. Campbell and J. Stanley, *Experimental and Quasi-Experimental Designs for Research* (1963), *reprinted from [First] Handbook of Research on Teaching* (1963); *see also* Campbell, "Legal Reforms as Experiments," *Journal of Legal Education*, 23 (1970), p. 217; Campbell and Ross, "The Connecticut Crackdown on Speeding: Time Series Data in Quasi-Experimental Analysis," *Law and Society Review*, 3 (1968), p. 33; Ross, Campbell, and Glass, "Determining the Social Effects of a Legislative Reform: The British 'Breathalyzer' Crackdown of 1967," *American Behavioral Scientist*, 13, 4 (1970), p. 493.

    The methodological failings of "impact" research—particularly studies employing the "one shot case study," "one-group pretest-posttest," or "static group comparison" designs—have been thoroughly established. *See* Lampert, "Strategies of Research Design in the Legal Impact Study: The Control of Plausible Rival Hypotheses," *Law and Society Review*, 1 (1966), p. 111, *reprinted in Compliance and the Law*, p. 67; Levine, "Methodological Concerns in Studying Supreme Court Efficacy," *Law and Society Review*, 4 (1970), p. 583, *reprinted in Compliance and the Law*, p. 99; Shapiro, "The Impact of the Supreme Court," *Journal of Legal Education*, 23 (1971), p. 77. Campbell and Stanley, *supra*, also criticize these widely used designs.

11. *See, e.g.*, Note, "Implementation Problems in Institutional Reform Litigation," *Harvard Law Review*, 91 (1978) [hereinafter cited as "Implementation Problems"] p. 428; Bardach; Ohlin, Coates, and Miller; and Bakal, in note at bottom of page 70.

12. Rodriguez v. San Antonio Indep. School Dist., 411 U.S. 24 n.56, 42-43 & n.86, 46-47 n. 101. *See* Clune, "Wealth Discrimination in School Finance," *Northwestern University Law Review*, 68 (1973), pp. 651, 658-61, for an expanded discussion of this issue. *See also* Coons, "Recent Trends in Science Fiction: *Serrano* among the People of Number," *Journal of Law and Education*, 6 (1977), p. 23, *reprinted in Education, Social Science and the Judicial Process*, eds. R. Rist and R. Anson (1977); McDermott and Klein, "The Cost Quality Debate in School Finance Litigation: Do Dollars Make a Difference?," *Law and Contemporary Problems*, 38 (1974), p. 415.

13. California, *Constitution*, art. 13a. Article 13a provides in relevant part:

    §1. Ad Valorem tax on real property; maximum amount. Section 1. (a) The maxi-

mum amount of any ad valorem tax on real property shall not exceed one percent (1%) of the full cash value of such property. . . . (b) The limitation provided for in subdivision (a) shall not apply to ad valorem taxes or special assessments to pay the interest and redemption charges on any indebtedness approved by the voters prior to the time this section becomes effective.

§3. Changes in state taxes; enactments to increase revenues; imposition. Sec. 3. From and after the effective date of this article, any changes in State taxes enacted for the purpose of increasing revenues collected pursuant thereto whether by increased rates or changes in methods of computation must be imposed by an Act passed by not less than two-thirds of all members elected to each of the two houses of the Legislature, except that no new ad valorem taxes on real property, or sales or transaction taxes on the sales of real property may be imposed.

§4. Special taxes; imposition. Sec. 4. Cities, counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property within such City, County or special district.

14. *See, e.g.*, Lottman, "Enforcement of Judicial Decrees: Now Comes the Hard Part," *Mental Disabilities Law Reporter*, 1 (1976), pp. 69, 74; "Implementation Problems," *supra* note 11 at 455. *See also* S. Wasby, *The Impact of the United States Supreme Court* (1970), pp. 84-85, 248-251.

15. *See generally* C. Perrow, *Complex Organizations* (1972), pp. 194-98, and the authorities cited therein. *See also* Mohr, "The Concept of Organizational Goals," *American Political Science Review*, 67 (1973), p. 470, for a survey of the literature on the concept and utility of organizational goals.

16. P. Blau, *The Dynamics of Bureaucracy* (1957).

17. K. Carlson, *Statewide Minimum Pupil Proficiency Standards*

in New Jersey: Interviews with Leading Figures (April 1978), p. 5-8.

18. Ch. 895, §§ 43, 43.5, 46, 1977 Cal. Stats. 2626-2637 (codified at Cal. Educ. Code § § 51215-51217, 51225, 52000-52001, 52010-52049.5) (mandating proficiency-based progress and graduation standards; creating a voluntary "school improvement" program to assess student needs, specify improvement objectives, and plan appropriate remedial measures to ensure achievement of the identified objectives).
19. Kirp, Buss, and Kuriloff, "Legal Reform of Special Education: Empirical Studies and Procedural Proposals," *California Law Review*, 62 (1974), pp. 44-45, 52-53.
20. *See e.g.*, S. Bailey and E. Mosher, *ESEA: The Office of Education Administers a Law* (1968); P. Briggs, *A Perspective on Change: The Administration of Title I of the Elementary and Secondary Education Act* (October 1973); Gaffney, Thomas, and Silverstein, *An Analysis of the Legal Framework for State Administration of Title I of the Elementary and Secondary Education Act of 1965* (September 1977); National Institute of Education (DHEW), *Administration of Compensatory Education* (September 1977).
21. E. Bardach, *The Implementation Game* (1977), p. 42.
22. Carlson, *supra* note 17, at 9-10, 11, 23; K. Carlson, *The Politics of School Reform: A Case Study of Minimum Standards in New Jersey*, (November 1977) [hereinafter cited as Carlson, *Politics of Reform*], pp. 10-12, 14. *See e.g.*, NJEA, "T & E Training Kit," (NJEA Summer Leadership Workshop, August 1977); NJEA, "Commentary on T & E: A Primer for School Improvement in New Jersey" (rev. ed. 1977).
23. *Serrano (I)*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).
24. *Serrano (II)*, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1977).
25. Ch. 894, 1977 Cal. Stats. 2602.
26. Attributed to Attorney John McDermott. Kloss, *The Sword and the Meat-ax: Serrano, Proposition 13, and the Shaping of School Finance in California* (October 1978), p. 17.
27. Adapted from Rhodes, Frentz, and Marshall, *supra* note 8, and *Serrano (I)* and *(II)*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345.
28. Rhodes, Frentz, and Marshall, *supra* note 8, at 20.
29. *Id.* at 13 table 2.
30. *Id.* at 19 table 5.

31. *Id.* at 19-21.
32. *See* note 13 *supra*.
33. John Coons, Professor of Law, University of California, interview, Boalt Hall, Berkeley, August, 1978.
34. *See* note 33 *supra*.
35. New Jersey Constitution, art. VIII, § IV, ¶1 provides:

> The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in this State between the ages of five and eighteen years.

36. *See generally*, L. Rubin, *An Evaluation of the Fiscal Impact of New Jersey's Public School Education Act of 1975 on the State's Low Wealth and Urban Districts* (June 1978), pp. 29-37.
37. *Robinson*, 287 A.2d 187, 221 (Law Div. 1972).
38. *Robinson*, 287 A.2d 213, 216 n.21, 217.
39. *Robinson*, 287 A.2d 216 n.21.
40. *Robinson (I)*, 303 A.2d 273 (1973).
41. On the question of full state assumption, see *Robinson*, 287 A.2d 214, *citing*, A. Wise, *Rich Schools, Poor Schools* (1968); J. Coons, W. Clune, and S. Sugarman, *Private Wealth and Public Education* (1970), for the conclusion that then current school finance systems—with the exception of the Hawaiian full state assumption system—deny equal protection.
42. *See, e.g.*, Silard and Goldstein, "Toward Abolition of Local Funding in Public Education," *Journal of Law and Education*, 3 (1974), p. 307.
43. 411 U.S. 1 (1973).
44. Article VIII, § IV, ¶1.
45. 306 A.2d 65 (1975).
46. 335 A.2d 6 (1975).
47. 351 A.2d 713 (1975). (339 A.2d 193 was republished in 351 A.2d 713 to correct a typographical error).
48. 351 A.2d 177-89 (Pashman, J., concurring in part only and dissenting).
49. 351 A.2d 735 (Mountain; Clifford, J. J., dissenting) (arguing for absolute deference to the legislature and avoidance of the complex "business of financing public education").
50. *Id.* at 146-48, 351 A.2d 719-20.
51. Ch. 212, 1975 N.J. Laws 871 (codified at N.J. Rev. Stat. 18A:

7A-1 *et seq.*). *See* R. Lehne, *The Quest for Justice* (1977), for an extended discussion of the politic machinations preceding passage of the act based on elite interviews.

52. Ch. 212, § 18, 1975 N.J. Laws 880 (codified at N.J. Rev. Stat. 18A: 7A-18).
53. *Robinson (V)*, 355 A.2d 145.
54. *Id.* at 149.
55. Ch. 212, § 25, 1975 N.J. Laws 883-84 (codified at N.J. Rev. Stat. 18A: 7A-25).
56. Ch. 212, § 18, 1975 N.J. Laws 881 (codified at N.J. Rev. Stat. 18A: 7A-18c.) and Ch. 212, § § 55, 56, 1975 N.J. Laws 895 (uncodified), respectively.
57. Ch. 212, § § 33, 34, 35, 1975 N.J. Laws 887-88 (codified at N.J. Rev. Stat. 18A:23-3, 39-15, 46-23, 58-7) and Ch. 212, § 20, 1975 N.J. Laws 881-83 (codified at N.J. Rev. Stat. 18A:7A-20), respectively.
58. 355 A.2d 129 (1976).
59. 358 A.2d 457 (1976).
60. 360 A.2d 400 (1976).
61. Ch. 212, § 18, 1975 N.J. Laws 880 (codified at N.J. Rev. Stat. 18A:7A-18).
62. M. Goertz, "Where Did the 400 Million Dollars Go?: The Impact of the New Jersey Public School Education Act of 1975" (Washington, D.C.: National Institute of Education, March 1978), p. 13, table 1, p. 29, table 8.
63. 355 A.2d 148 (Conford, P.U.A.D., temporarily assigned, concurring and dissenting).
64. N.J. Rev. Stat. 18A:7A-10 as amended; N.J. Ad. Code 6:8-3.4, 3.8(e).
65. N.J. Rev. Stat. 18A:7A-7 as amended; N.J. Ad. Code 6:8-3.1, 3.3.
66. N.J. Rev. Stat. 18A:7A-14 as amended.
67. Ch. 212, § 15, 1975 N.J. Laws 879-80 (codified at N.J. Rev. Stat. 18A:7A-15).
68. Ch. 212, § § 15, 16, 1975 N.J. Laws 879-80 (codified at N.J. Rev. Stat. 18A:7A-15, 16).
69. Ch. 212, § § 10, 11, 1975 N.J. Laws 878, *as provided in* ch. 212, § 14, 1975 N.J. Laws 879.
70. Ch. 212, § 44, 1975 N.J. Laws 892 (codified as N.J. Rev. Stat. 18A:4-24).
71. Ch. 212, § 47, 1975 N.J. Laws 898 (codified at N.J. Rev. Stat.

18A:7A-30).

72. N.J. Rev. Stat. 18A:7A-14, 15, as amended; N.J. Ad. Code 6:8-7.1.
73. N.J. Ad. Code 6:8-7.1 (c).
74. *Compare* ch. 212, § § 14, 15, 1975 N.J. Laws 879-80 (codified at N.J. Rev. Stat. 18A:7A-14, 15) (which authorizes the Commissioner to make a finding on district "progress towards the [Act's] goals, guidelines, objectives and standards. . . .") *with* N.J. Ad. Code 6:8-6.2 (which mandates the commissioner to classify each school district and each school within a district as either approved, approved with conditions, or unapproved).
75. *See* note 74, *supra*.
76. Kenneth Carlson, *An Analysis of Minimum Pupil Proficiency Standards in New Jersey*, NIE Grant C-76-0105. *See also* Research For Better Schools, *New Jersey Pilot Study of "T&E" Expectations and Implementations in Selected School Districts*, NIE Contract C400-76-0043.
77. Paul Tractenberg, Professor of Law, Rutgers University Law School, interview, March 6, 1979.
78. *Id.*
79. N.J. Department of Education, "Minimum Basic Skills Program, 1976-77," (unpublished computer printout on file with the author).
80. *See* notes 67-74 and accompanying text, *supra*.
81. 355 A.2d 135.
82. Bardach, *supra* note 21, at 268-83.
83. *See* note 74, *supra*.
84. *Compare* Plaintiffs' Verified Complaint, Bd. of Educ., Levittown v. Nyquist, 94 Misc. 2d 466, 408 N.Y.S.2d 606 (1978), *with* Plaintiffs-Intervenors' Verified Complaint for Declaratory and Other Relief, Bd. of Educ., Levittown v. Nyquist, 94 Misc. 2d 466, 408 N.Y.S.2d 606 (1978).
85. Tractenberg, "The Justiciability of Challenges to School Finance Laws: An Exercise in Judicial Power or Futility?" (forthcoming article).
86. *See generally*, "Implementation Problems," *supra* note 11.
87. One of the most consistently one-sided contributions to this literature—*The Courts and Social Policy* (1977) by Donald Horowitz—received the 1978 "Brownlow Award" from the National Academy of Public Administration.
88. Carlson, *Politics of Reform*, *supra* note 22, at 5-6.
89. In this chart, 7A citations refer to title 18A, chapter 7A of the

New Jersey Revised Statutes; 6:8 citations refer to title 6, chapter 8 of the New Jersey Administrative Code.

90. In 1976, the 1975 act was amended to provide for minimum, uniform statewide basic skills standards in reading and mathematics. Ch. 97, 1976 N.J. Laws 480. [Hereinafter referred to as the 1976 amendment]. Since the commissioner—at the state level—established minimum acceptable proficiency levels in reading and mathematics on the statewide assessment instrument, this provision constitutes a departure from the process/delegation model.

The 1976 amendment to § 18A:7A-6 provided for:

> . . . uniform Statewide standards of pupil proficiency in basic communications and computational skills at appropriate points in the educational careers of the pupils in the State, which proficiency standards shall be reasonably related to those levels of proficiency ultimately necessary as part of the preparation of individuals to function politically, economically and socially in a democratic society. . . .

The 1976 amendment to § 18A:7A-7 added the following provision:

> In each district in which there are pupils whose proficiency in basic communications and computational skills is below the Statewide standard, the local board annually shall establish an interim goal designed to assure reasonable progress toward the goal of achievement by each such pupil of at least the Statewide standard of proficiency. Each such district as part of its annual educational plan, shall develop a basic skills improvement plan for progress toward such interim goal. Any such improvement plan shall be approved by the commissioner, and may include (a) curricular changes; (b) in-service training programs for teachers; (c) diagnostic, remedial, or skill-maintenance programs for pupils; (d) consultations with parents or guardians; (e) any other measure designed to promote progress toward such interim goal. Each year each district shall evaluate pupil profi-

ciency in basic communications and computational skills, and determines its relation to, and progress toward Statewide and any interim goals concerning pupil proficiency in such skills. Such evaluation may be based in part on annual testing and in part on such other means as the board deems proper to determine pupil status and needs, ensure pupil progress, and assess the degree to which the goals have been achieved.

92. The 1976 amendment to § 18A:7A-11 added "the results of the district evaluation of pupil proficiency in basic communication and computational skills" to the data required in the district's annual report. The amendment also provided:

> In addition to such annual report the commissioner shall, 4 years from the effective date of this amendatory act, report to the Governor and the Joint Committee on the Public Schools assessing the effectiveness of this amendatory act in improving the proficiency of the pupils of this State in basic communications and computational skills. Within 6 months of receiving such report the Joint Committee on the Public Schools shall recommend to the Legislature any necessary or desirable changes or modifications in this amendatory act.

93. The 1976 amendment to the § 18A:7A-14 provided for the additional requirement that districts must show sufficient progress toward "the State goal and any interim local goal concerning pupil proficiency in basic communications and computational skills, established pursuant to this act, . . ."
94. *Id.*
95. N.J. Rev. Stat. 18A:7A-6.
96. *Id.*, 18A:7A-7.

AND FISCAL

1 "APPROACHES TO THE STUDY OF COURT IMPACT," by [illegible] Kirkham, Department of Political Science, University of [illegible]

2 "ON DOING A VALUES STUDY OF A HIGH COURT DECISION," by Philip K. Piele, College of Education, University of Oregon

3 "THE IMPACT OF STUDENT RIGHTS AND DISCIPLINE CASES ON SCHOOLS," by Ellen Jane Hollingsworth, Center for Public Representation, Madison, Wisconsin

4 "SERRANO AND ROBINSON: STUDIES IN THE IMPLEMENTATION OF FISCAL EQUITY AND EFFECTIVE EDUCATION AS ORDERED BY STATE SUPREME COURTS," by William H. Clune III, Law School, University of Wisconsin--Madison

See VOLUME I
which includes four papers on Desegregation

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